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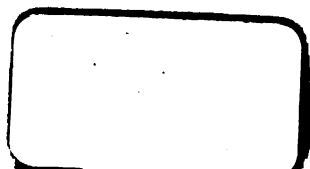
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REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF THE
STATE OF CALIFORNIA.

C. P. POMEROY,
REPORTER.

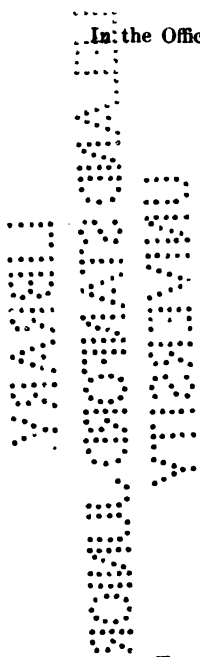
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ORGANIZATION OF SUPREME COURT.

[Constitution, article 6, section 2.]

§ 2. The Supreme Court shall consist of a chief justice and six associate justices. The court may sit in departments and in Bank, and shall always be open for the transaction of business. There shall be two departments, denominated, respectively, Department One and Department Two. The chief justice shall assign three of the associate justices to each department, and such assignment may be changed by him from time to time. The associate justices shall be competent to sit in either department, and may interchange with each other by agreement among themselves, or as ordered by the chief justice. Each of the departments shall have the power to hear and determine causes and all questions arising therein, subject to the provisions hereinafter contained in relation to the court in Bank. The presence of three justices shall be necessary to transact any business in either of the departments, except such as may be done at chambers, and the concurrence of three justices shall be necessary to pronounce a judgment. The chief justice shall apportion the business to the departments, and may, in his discretion, order any cause pending before the court to be heard and decided by the court in Bank. The order may be made before or after judgment pronounced by a department; but where a cause has been allotted to one of the departments, and a judgment pronounced thereon, the order must be made within thirty days after such judgment, and concurred in by two associate justices, and if so made it shall have the effect to vacate and set aside the judgment. Any

four justices may, either before or after judgment by a department, order a case to be heard in Bank. If the order be not made within the time above limited, the judgment shall be final. No judgment by a department shall become final until the expiration of the period of thirty days aforesaid, unless approved by the chief justice, in writing, with the concurrence of two associate justices. The chief justice may convene the court in Bank at any time, and shall be the presiding justice of the court when so convened. The concurrence of four justices present at the argument shall be necessary to pronounce a judgment in Bank; but if four justices, so present, do not concur in a judgment, then all the justices qualified to sit in the cause shall hear the argument; but to render a judgment, a concurrence of four judges shall be necessary. In the determination of causes, all decisions of the court in Bank or in departments shall be given in writing, and the grounds of the decision shall be stated. The chief justice may sit in either department, and shall preside when so sitting, but the justices assigned to each department shall select one of their number as presiding justice. In case of the absence of the chief justice from the place at which the court is held, or his inability to act, the associate justices shall select one of their own number to perform the duties and exercise the powers of the chief justice during such absence or inability to act.

SUPREME COURT COMMISSIONERS.

[Statutes 1899, page 11.]

SECTION 1. The Supreme Court of the State of California shall immediately upon the expiration of the term of office of the present Supreme Court Commissioners appoint five persons of legal learning and personal worth as Commissioners of said Court. It shall be the duty of said Commissioners, under such rules and regulations as said Court may adopt, to assist in the performance of its duties and in the disposition of the numerous causes now pending in said Court undetermined. The said Commissioners shall hold office for the term of two years from and after their appointment, during which time they shall not engage in the practice of the law. They shall each receive a salary equal to the salary of a Judge of said Court, payable at the same time and in the same manner. Before entering upon the discharge of their duties they shall each take an oath to support the Constitution of the United States, and the Constitution of the State of California, and to faithfully discharge the duties of the office of Commissioner of the Supreme Court to the best of their ability. The said Court shall have power to remove any and all members of said Commission at any time by an order entered on the minutes of said Court, and all vacancies in said Commission shall be filled in like manner.

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REPORTS OF CASES

DETERMINED IN

THE SUPREME COURT

OF THE

STATE OF CALIFORNIA.

[S. F. No. 1021. Department One.—June 7, 1899.]

G. F. GRAY et al., Appellants, v. JAMES ESCHEN et, al.,
Respondents.

GOODS SOLD AND DELIVERED—BLASTED MATERIALS—PROOF OF OWNERSHIP—LEASE—TITLE TO LAND BLASTED.—In an action of *assumpsit*, for goods sold and delivered, which consisted of blasted materials, claimed by the plaintiffs to have belonged to them, and to have been taken away by the defendants, when the ownership thereof by plaintiffs was denied, proof thereof devolved upon them; and where they introduced a lease to themselves of premises from which they claimed the materials were taken, the right of the plaintiffs to recover depends upon the ownership by their lessor of the land from which the materials were blasted, and they cannot claim that such ownership was not in issue.

ID.—INSTRUCTIONS—OWNERSHIP OF LAND—BLASTING FROM STREET.—Instructions in such action, based upon testimony that the blasting was done by plaintiffs' lessor within the lines of a public street, to the effect that if the jury find that plaintiffs' lessor was not the owner of the land from which the materials were blasted, and had no interest therein, and that plaintiffs' only right to the materials was derived from him, their verdict should be for the defendants, and that, if any of the materials were blasted out of the street without the consent of the city authorities, their verdict should be for the defendants as to all materials which came from the street, are correctly given.

ID.—TITLE OF DEFENDANTS TO "WASTE" MATERIALS.—Where it appeared that defendants had bought from plaintiffs' lessor, and paid for all "waste" materials blasted by him on the premises subsequently leased by him to plaintiffs, the title of the defend-

ants to such "waste" materials is superior to that of the plaintiffs; and plaintiffs only took from their lessor what had not before been sold to the defendants.

EXCEPTIONS TO INSTRUCTIONS—PRESUMPTION UPON APPEAL.—A general exception to the instructions without specifying any particular instruction or part thereof, is insufficient; and where the court stated generally that every portion of the charge is deemed excepted to it, will be presumed upon appeal against error not shown affirmatively, and all the instructions were given at the request of appellant's counsel, of which appellant cannot complain.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. William R. Daingerfield, Judge.

The complaint is in the general form of *assumpsit* for goods, wares, and merchandise sold and delivered. There is no evidence in the record of any sale, but plaintiffs in support of their complaint, attempted to prove the taking by defendants of certain broken rock claimed to have been the property of plaintiffs. On February 23, 1895, defendants paid to one John Kelso on hundred dollars for which a receipt was given as follows: "To waste on property on the corner of Lombard and Montgomery streets, one hundred dollars. Paid February 23, 1895. John Kelso, by Saml. L. Lent." On July 30, 1895, the said Kelso gave a lease of a lot of land on Lombard and Montgomery streets to plaintiffs, which lease expressed that it was "for the purpose of having the rock removed therefrom, and the said lots graded to the level of the present grade," et cetera. Prior to February, 1895, said Kelso had blasted the bluff in the vicinity of Lombard and Montgomery streets, by which blast several thousand tons of rock, debris, et cetera, were thrown upon the land in the vicinity, and upon the lot so leased by said Kelso to plaintiffs. The rock and earth had been loosened by the blast before the receipt was given to defendants by Kelso for the one hundred dollars. The portion of the rock so lying upon the ground, and claimed to have been taken away by defendants after July 30th, is the property alleged to have been sold and delivered to defendants. Further facts are stated in the opinion.

Fisher Ames, for Appellants.

Boyd & Fifield, for Respondents.

COOPER, C.—Action to recover fifteen hundred and eighty dollars for goods, wares, and merchandise alleged to have been sold and delivered by plaintiffs to defendants. Verdict and judgment for defendants. Motion for new trial and order denying the same. This appeal is from the judgment and order.

The plaintiff's counsel in the bill of exceptions and statement specifies six errors of law occurring at the trial by reason of the court giving certain instructions to the jury, but in his brief argues only four, and we will examine only those urged in the brief. The first instruction complained of reads as follows: "If you find and believe that John Kelso was not the owner of the land from which the said materials were blasted, and had no interest or estate in said land which gave to him the right to blast them out, and the only right to said materials derived to the plaintiffs was derived from John Kelso, your verdict will be for the defendants."

It is not claimed but that the instruction is correct as an abstract proposition of law, but it is said there was no issue as to the ownership by John Kelso of the lands from which said materials were blasted. The plaintiffs, under the issues made by the pleadings, had to prove that they were the owners of the "merchandise sold and delivered" to defendants. To prove such title they introduced what is called a lease from John Kelso to them, and the whole theory of the plaintiff is that the rocks were taken from the premises described in this lease. If Kelso did not own the land from which the materials were blasted, the plaintiffs, as we understand the case, could not recover. There was testimony that all the blasting was within the lines of Lombard street. If this is true, then the rock did not come from the lands described in the lease to plaintiffs and Kelso was not the owner of the lands from which the materials were blasted. It is claimed that it was error for the court to use the words "said materials," because the term is so indefinite that the jury may have considered that it meant rock as well as waste material. The court in other parts of its instruction referred to said materials as those taken by defendants and told the jury that they were to determine from all the facts and circumstances

what materials were included within the term "waste." Applying the rule that all the instructions are to be read together as supplementing and explaining each other, the instruction could not have been misleading.

The second instruction complained of reads as follows: "If you find and believe that the said materials, or any part thereof, was blasted out of Lombard street, without the license of the proper authorities of the city and county of San Francisco, then your verdict will be for the defendants, so far as all the materials which so came out of Lombard street, if any, are concerned, but not necessarily as to the other materials."

The reason given as to why the first instruction was not prejudicial error apply to this. There was testimony in the record that the blasting was out of Lombard street.

The third instruction complained of is as follows: "If you find and believe that said materials came out of the fifty-vara lot on the southwest corner of Lombard and Montgomery streets, and that all the allegations of the complaint are true, then your verdict for the value of said materials (exclusive of waste) will be for the plaintiffs."

The instruction was certainly favorable to plaintiffs and could not have injured their case unless they were entitled to recover for "waste." Defendants had bought of Kelso and paid for the "waste" long before the lease was made to plaintiffs. If defendants and plaintiffs both claim title from a common source, as counsel elsewhere states in his brief, it appears to us that the plaintiffs only took from Kelso that which had not before been sold to defendants.

The fourth and last instruction complained of reads as follows: "On the contrary, if you find and believe that the defendants took and removed materials other than waste, and that the complaint is true, then your verdict for said materials, other than waste so taken and removed, will be for the plaintiffs." This instruction is practically the same as the third complained of, and for the same reasons the giving of it was not error. We have considered the alleged errors in giving the instructions, but we might well have held that proper exceptions were not taken to them. The court in giving the instructions said: "I give you the following in-

structions based upon those given by the respective counsel, and in some instances they have been modified by the court"; and then proceeded to read or give the instructions. They were not numbered, and there is nothing in the record to show whether any particular instruction was given at the request of the plaintiff or of the defendant, or, if modified by the court, in what respect or what was the instruction modified. The respective counsel asked after the instructions were read "that certain exceptions to the instructions given by the court be reserved." The court stated: "It is understood that every portion of the charge is deemed excepted to by each counsel, and every omission or modification is also deemed excepted to by each counsel." We cannot possibly say from this record that there was a single omission or modification. It does not appear that plaintiff excepted to any instruction or any portion of any instruction. If the instructions under the statement of the court are deemed excepted to by plaintiffs, we are toally in the dark as to whether such instruction was given at the request of plaintiffs or of defendants. It certainly could not avail plaintiffs' counsel to except to an instruction offered by himself. It is presumed that the proceedings in the court below were regular, and where error is claimed it is incumbent upon appellants to show it affirmatively.

Applying the rule to the instructions given in this case, we must presume that each and every on of the instructions were given at the request of plaintiffs' counsel. We find nothing in the record to show that plaintiffs excepted to any one of the instructions so given, but the court said that they might each be deemed excepted to. It cannot avail counsel to deem his own instructions "excepted to." In *Bernstein v. Downs*, 112 Cal. 205, certain instructions were given to the jury at the request of plaintiff. Counsel for defendants said: "We except to the instructions asked for and allowed by the court on the part of the plaintiff." This court held this was not a specification of the particular errors upon which the party intended to rely and in the opinion said: "There certainly should be at least an exception to each of the instructions by number or other designation, otherwise the attention of the court is not called to any one particular alleged error."

If counsel in this case had said at the conclusion of giving the instructions, "I except to every portion of the charge and every omission or modification thereof," it could not plausibly be claimed that the exception was sufficient. If it would not have been sufficient for counsel to have made the exception in this form, it certainly was not sufficient "that he be deemed to have made it." In the case of *Cockrill v. Hall*, 76 Cal. 195, the exception was: "To each and every part and to the whole of said instructions the plaintiff duly excepted." This court held the exception insufficient, and in discussing the exception said: "This was nothing more than an exception taken to the whole charge of the court without bringing to its attention any special point where error was claimed to have been committed." Under the rule laid down in the above cases we do not think, even if the instructions contain error, that plaintiffs can avail themselves of it on this record.

We advise that the judgment and order be affirmed.

Haynes, C., and Chipman, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are affirmed.

Harrison, J., Garoutte, J., Van Dyke, J.

[S. F. No. 956. Department Two.—June 8, 1899.]

F. E. JOHNSON, Appellant, v. BANK OF LAKE, Respondent.

CORPORATIONS—LIABILITY OF STOCKHOLDERS—CREATION OF LIABILITY FOR SERVICES—STATUTE OF LIMITATIONS.—The liability of a corporation and of the stockholders thereof for the services of an attorney employed to defend the corporation in an action brought against it is not created until the rendition of the services performed by the attorney; and the statute of limitations does not begin to run against the stockholders of the corporation from the date of the contract of employment of the attorney.

APPEAL from a judgment of the Superior Court of Lake County. R. McGarvey, Judge.

The facts are stated in the opinion of the court.

Garret W. McEnerney, and T. J. Sheridan, for Appellant.

The liability was created by law (Code Civ. Proc., sec. 339; *Hunt v. Ward*, 99 Cal. 612; 37 Am. St. Rep. 87); but it was *Green v. Beckman*, 59 Cal. 545; *Moore v. Boyd*, 74 Cal. 167; not created in this case until the services were rendered. There was no liability to pay for the services until they were rendered (*Garrison v. Howe*, 17 N. Y. 458), and the liability is not barred by the statute of limitations.

M. S. Sayre, for Respondent.

The statutory liability of stockholders does not depend upon the accrual of a cause of action, but is created by the contract, under which it is incurred, whether the liability thereby created be absolute or contingent, or whether time be or be not given for its performance. The liability of the defendant is barred by the statute of limitations. (*Hunt v. Ward*, 99 Cal. 614; 37 Am. St. Rep. 87; *Redington v. Cornwell*, 90 Cal. 63; *Bank of San Luis Obispo v. Pacific Coast S. S. Co.*, 103 Cal. 594; *Winona Wagon Co. v. Bull*, 108 Cal. 1.)

HENSHAW, J.—Plaintiff by appropriate allegations sought to enforce a liability against the Bank of Lake, as a stockholder of the Lakeport Agricultural Park Association. By his first cause of action he charged for the value of his services as an attorney at law, rendered to the association at its request, in defense of an action in which it was a defendant, “in consideration of which the Lakeport Agricultural Association promised, undertook, and agreed to pay the plaintiff the reasonable value of the said services whenever thereto requested.” The second cause of action charged for moneys expended by plaintiff for the association at its request and under its promise of repayment. The third cause of action was for the value of the services of J. J. Bruton, rendered under a like employment as attorney at law in the same litigation, Bruton’s claim having been assigned to plaintiff. The court found the employment, the value of the services, and the expenditures of moneys all as pleaded in the complaint, but it found that defendant’s plea of the statute of limitations was a good plea “because the employment of plaintiff and of Bruton to perform the services which they did perform was made prior to the time when the defendant

became a stockholder, although the services were acutally performed and rendered after the date when defendant became such stockholder." Judgment, therefore, passed for the defendant, saving as to a small portion of the money expended. As to this money no question is made upon this appeal.

Section 359 of the Code of Civil Procedure provides that an action against a stockholder of a corporation to enforce a liability created by law must be brought within three years after the liability was created. Section 322 of the Civil Code declares that the liability of each stockholder is determined by the amount of stock or shares owned by him at the time the debt or liability was incurred. The point here presented then is: When, under this contract, was the liability of the corporation created? If it was created at the time of the employment, as the trial court held, its judgment is admittedly proper. If it was created at the time when the services were fully performed, then the defendant corporation is liable in the amount sued for. In *McBean v. Fresno*, 112 Cal. 159, 53 Am. St. Rep. 191, this court had occasion to construe a contract of the city of Fresno, which was to continue for five years, and which involved the expenditure of four thousand nine hundred dollars per annum, payable quarterly. It was called upon to interpret the contract under the provisions of the constitution prohibiting cities from incurring indebtedness or liability in any manner, or for any purpose, exceeding in any year the income and revenue provided for it for such year, in connection with the charter of the city which declared: "The trustees shall not create, audit, allow or permit to accrue any debt or liability in excess of the available money in the treasury." It was contended on behalf of the city, as it is contended by respondents here, that the liability was created and incurred at the time when the contract was entered into. But the conclusion reached and expressed by this court was that: "At the time of entering into the contract no debt or liability was created for the aggregate amount of the installments to be paid under the contract, but that the sole debt or liability created was that which arose from year to year in separate amounts as the work was performed." To the same effect is *State v. McCauley*, 15 Cal. 429. In accord-

ance with this same construction may be cited *Garrison v. Howe*, 17 N. Y. 458. In each case the time of the creation of the liability is to be determined by the conditions of the contract itself. In the case at bar, it is apparent that the association's liability to pay arose only after performance by the attorney of the requested services. Before the services had been performed the attorney could no more have exacted payment under the contract than could McBean in advance of his rendition of the services have required from the city of Fresno the aggregate amount of payments contemplated by his five years' contract.

The judgment appealed from is therefore reversed.

Temple, J., and McFarland, J., concurred.

Hearing in Bank denied.

[S. F. No. 1091. Department Two.—June 8, 1899.]

LEMUEL PEISER et al., Appellants, v. THOMAS H. GRIFFIN, MINNIE L. PEISER, and W. B. BRADBURY, Intervenor, Respondents.

ACTION TO ENFORCE TRUST—AMENDMENT TO COMPLAINT—CHANGE OF ACTION—TRANSFER OF COMMUNITY PROPERTY BY WIFE—STATUTE OF LIMITATIONS.—A complaint by a husband and child to enforce a trust against his wife, and her grantees, based upon the theory that she took the legal title as trustee for the benefit of the husband, wife and child, in equal shares, and conveyed it in violation of the trust, and that her grantee and his successor were not innocent purchasers, cannot be amended so as to change the cause of action by averring that the property held in the name of the wife was community property, of which she could not transfer the title, if such new cause of action was barred by the statute of limitations at the time of the proposed amendment.

ID.—LIMITATION OF PAST CAUSE OF ACTION—VALID AMENDMENT OF CODE.—The amendment of March 3, 1893, to section 164 of the Civil Code, providing that where married women conveyed real property acquired prior to May 19, 1889, the husband shall be barred from commencing any action to show that said real property was community property from and after July 1, 1894, is a valid statute of limitations, fixing the time within which an action to avoid such a past conveyance by the wife must be brought.

ID.—AMENDMENT AFTER BAR OF ACTION—CONSTITUTIONAL LAW.—If the statute of limitations has barred the right to commence an action to set aside a conveyance, the title of the property is regarded as vested in the possessor, irrespective of the original right, and no subsequent amendment or repeal of the limitation can constitutionally have a retroactive effect so as to disturb the title.

ID.—FINDINGS—PAYMENT BY HUSBAND—TRUST.—A finding in the action to enforce the trust that the husband paid for the property held in the wife's name is not a finding that the property was community property, and does not warrant a judgment for the husband if the court finds that the wife did not hold the property in trust.

ID.—FAILURE OF ACTION—OMISSION TO FIND—TITLE OF INTERVENOR.—Where, under the findings made, the judgment properly followed that the plaintiffs take nothing by their action, an omission to find determinately as to the title of an intervenor, who claimed to be a *bona fide* purchaser for value from the grantee of the wife, is immaterial, and cannot work an injury to the plaintiffs.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. J. M. Seawell, Judge.

The facts are stated in the opinion of the court.

Willard A. Richardson, for Appellants.

Thomas J. Clunie, for Thomas H. Griffin, Respondent.

O'Brien, O'Brien & O'Brien, for W. B. Bradbury, Intervenor, Respondent.

HENSHAW, J.—Lemuel Peiser for himself and as guardian *ad litem* of Edwin A. Peiser, his minor son, sued Thos. H. Griffin and Minnie L. Peiser, his wife. He alleged that on May 1, 1889, two certain lots of land in San Francisco were purchased with his money, and "that the deed of conveyance was had and made in the name of Minnie L. Peiser for the purpose of and in trust for plaintiff and said Minnie L. Peiser, and the child of parties, Edwin Adair Peiser"; that Thomas H. Griffin conspired with Minnie Peiser to defraud plaintiffs of their property, and, exercising undue influence upon her, induced her to convey and transfer the property to him. A judgment was sought restraining Griffin from alienating the property and setting aside Mrs. Peiser's deed to him. This complaint was filed on June 26, 1889.

Griffin answered denying the charge of undue influence. In October, 1890, W. B. Bradbury was allowed to intervene, and filed his complaint, in which he set up that without notice and for a valuable consideration he had upon June 24, 1889, purchased the property from Griffin. The answer to this complaint in intervention consisted of denials and an iteration of the matters pleaded in the original complaint. It was filed in March, 1895.

Upon these pleadings trial was had. The court found that the land in question was paid for with the money of Lemuel Peiser, and that the deed was taken in the name of his wife; that his wife did not hold the title to the property under any trust; that the wife conveyed the property to Griffin without any valuable consideration, but that she had not been moved to the making of the deed by undue influence; that Bradbury purchased the property upon June 24, 1889, for a valuable consideration. The judgment denied plaintiffs any relief, and gave costs to defendant Griffin and intervenor Bradbury. From this judgment, and from the order denying a new trial, plaintiffs appeal.

Upon the trial it was shown that Mrs. Peiser conveyed to Griffin one lot, and assigned to him a contract for the purchase of a second lot. Plaintiffs thereupon sought leave to file an amended complaint, setting up that the first lot was purchased with community funds, and was community property; that the same was true of the second lot, and that the later installments called for by the contract had all been paid by the plaintiff since the commencement of the action. The court refused permission to file this offered pleading. In so doing it held that the proposed complaint did not amend the old, but charged upon a new and distinct cause of action, and that the statute of limitations barred plaintiffs' right to prosecute upon this new cause. The soundness of the court's ruling on this matter is the most important question in this case.

The original complaint is framed upon the theory that the trustee holding the legal title had made a conveyance in violation of the trust to one not an innocent purchaser for value, which conveyance was, therefore, voidable at the in-

stance of the beneficiaries (Civ. Code, sec. 869); for, if the property was community property, the legal title remained in the husband, notwithstanding that the deed was taken in the name of the wife, and the wife could not pass the title to it. An attempt of the wife to dispose of community property, real or personal, is a nullity. "If land, being community property, is conveyed to the wife during marriage, she takes no real title in it. The whole title, both real and equitable, at once vests in the husband by means of the deed to the wife. . . . Even the portion of community property standing in her own name and acquired by her, the wife cannot convey nor transfer." (Pomeroy on Community Property, 4 West Coast Rep. 390, 393; *Tryon v. Sutton*, 13 Cal. 490; *Van Maren v. Johnson*, 15 Cal. 308.) If the original complaint had been framed upon the theory that the property was community property, it would certainly have contained some distinct allegation to this effect, but it does not. The averment that the property was purchased with the money of the husband might be open to the construction that community money was meant thereby were the action prosecuted against a mere stranger, but, as against his wife and her grantee, under this complaint it can only have reference to the husband's separate property, or, if it can be said that it refers to community property, then the further allegations demonstrate that its character as community property was destroyed by the express trust created in the wife as trustee for the benefit of the three. If the husband had meant to avoid the deed of his wife as being an attempt by her alone to pass title to the community property, he would not have pleaded a trust; he would not have sued as guardian *ad litem* of his minor son, who could have no actionable interest in the community property; he would not have sought an injunction to restrain Griffin from cheating and defrauding him by conveying the property away, when Griffin would have had nothing to convey. The manifest theory of the original complaint is, that the legal title vested in Mrs. Peiser, as it could not vest if the property were community property; that it vested in her under a trust which created an equitable interest or title to one-third each of the land in the father and minor son. By the proposed amended complaint all of these issues are withdrawn, and another and distinct cause of action is pleaded,

namely, an action to establish that the property which had stood in the name of Mrs. Peiser was community property, and, consequently, that the title had always been in the husband, and could not have been conveyed by the wife's deed.

At the time when this suit was commenced such an action was open and available to the plaintiff, but upon March 3, 1893, section 164 of the Civil Code was amended. With other important changes which were wrought by the amendment, it was provided that in cases where married women have conveyed real property which they acquired prior to May 19, 1889, the husbands shall be barred from commencing any action to show that said real property was community property, or to recover such real property from and after July 1, 1894. This is a perfectly valid statute of limitations fixing the time within which an action to avoid such a past conveyance of the wife must be brought. It applied to this plaintiff's right of action, for Mrs. Peiser acquired the property prior to May 19, 1889, and her deed to Griffin was executed in June, 1889. The application to file the amended complaint was made in May, 1896. At that time plaintiff could not have commenced and maintained such an action as an original proceeding, and the court, under intervenor's objection, properly refused to permit him, in the guise of an amendment, indirectly to do the same thing. Nor was it incumbent on the court to permit the amendment with leave to the adverse parties to plead the statute. Their objection to permitting the amended answer to be filed was that it was not an amendment to the old, but the statement of a new cause of action, and one that was barred by the provisions of section 164 of the Civil Code. These grounds of objection being well taken, the proposed pleading was properly excluded from the files.

On March 4, 1897, section 164 of the Civil Code was again amended. It now contains this provision: "In cases where married women have conveyed or shall hereafter convey real property which they acquired prior to May 19, 1889, the husbands or their heirs or assigns of such married women shall be barred from commencing or maintaining any action to show that said real property was community property, or to recover said real property, as follows: As to conveyances

heretofore made, from and after one year from the date of the taking effect of this act, and, as to conveyances hereafter made, from and after one year from the filing for record in the recorder's office of such conveyances respectively." Appellants contend that this amendment operates to enlarge the time for the commencement of the action, and that, even if the trial court was justified in refusing to allow them to file an amended complaint owing to the condition of the law at the time when the amended pleading was offered, still the code amendment of 1897 being within the judicial knowledge of this court, we should now accord appellants the permission contemplated by the present law. But at the time when plaintiff proposed his amendment the statute of limitations barring his right to commence such an action had already run. By its running the title to the property, irrespective of the original right, is regarded as vested in the possessor and the subsequent repeal of the limitation law cannot be given a retroactive effect so as to disturb the title. (Cooley's Constitutional Limitations, 6th ed., 448.)

The foregoing renders unnecessary any extended consideration of appellants' remaining points. The findings are responsive to the issues tendered by plaintiffs' complaint. For the most part they negative the averments therein contained. The finding in the language of the complaint that the land was purchased with the money of Lemuel Peiser is not a finding that the property in question was community property, and therefore did not warrant, as appellants contend, a judgment in their favor. Under the findings, the judgment properly followed that plaintiffs should take nothing by their action. Appellants complain that the findings under the complaint in intervention do not determine the title, but, as under the findings actually made they could not under any possibility recover, additional findings could not have benefitted them, and the absence of them cannot work them injury. We perceive no rulings in the admission or rejection of evidence which call for especial consideration.

The judgment and order appealed from are therefore affirmed.

Temple, J., and McFarland, J., concurred.

[S. F. No. 1113. Department Two.—June 8, 1899.]

JOHN T. DOYLE, Respondent, v. REPUBLIC LIFE INSURANCE COMPANY. SAMUEL D. WARD, Receiver, et cetera, Appellant.

APPEAL—DISMISSAL—ORDER REFUSING TO VACATE DEFAULT JUDGMENT.

An appeal from an order refusing to vacate a judgment by default, being from an order made after final judgment, must be taken within sixty days from the date of the order, and if not so taken must be dismissed.

ID.—NONAPPEALABLE ORDER—DENIAL OF NEW TRIAL OF MOTION.—It is not proper practice to move for a new trial of a motion to vacate a judgment; and the order refusing to vacate the judgment being appealable, a subsequent order refusing to vacate it, or denying a motion for a new trial thereof, is not appealable, and an appeal therefrom must be dismissed.

APPEALS from orders of the Superior Court of San Mateo County, refusing to vacate a judgment by default, and denying a new trial of the motion. George H. Buck, Judge.

The facts are stated in the opinion of the court.

Vincent Neale, for Appellant.

Garret W. McEnerney, for Respondent.

HENSHAW, J.—Plaintiff had obtained judgment against the Republic Life Insurance Company, a corporation organized under the laws of the state of Illinois. The service of the summons was by publication and mailing, and the defendant corporation suffered default. One year less eleven days after entry of this judgment S. D. Ward asked that it be vacated, and that he, as receiver of the defendant corporation under appointment of the circuit court of Illinois, be permitted to answer to the merits of the action. His motion was denied by an order given on May 12, 1896. Thereafter he moved for a new trial of this motion, and by its order of May 8, 1897, the court denied his latter application. He took his appeals from both of these orders after that date.

Neither of these appeals can be entertained. The order of the court refusing Ward leave to answer was not a final judgment, but was an order made after final judgment. His

appeal therefrom was not taken within sixty days. (Code Civ. Proc., sec. 939, subd. 3.) It must, therefore, be dismissed.

The order denying the motion for a new trial of the petition for leave to answer is not appealable: 1. Because the practice of moving for a new trial of a motion is one neither countenanced nor permitted by our procedure (Code Civ. Proc., secs. 590, 656); and 2. Because a subsequent order refusing to vacate an appealable order, which has been regularly and advisedly made, is not appealable. (*Harper v. Hildreth* 99 Cal. 265.)

Both of the appeals are, therefore, ordered dismissed.

Temple, J., and McFarland, J., concurred.

[S. F. No. 1596. Department Two.—June 9, 1899.]

THE PEOPLE, Respondent, v. W. J. HILL, Appellant.

MUNICIPAL ELECTION—CLOSING OF POLLS—CONSTRUCTION OF CHARTER.—

In a city charter providing that all the provisions of law regulating elections for state and county officers shall apply so far as practicable to elections under the charter, and providing further specifically that the polls shall be opened at such hour as may be designated by the mayor and common council in the notice of election, but in no case later than 2 o'clock P. M., and that they shall not be closed until sundown, the special provision for the time of closing of the polls will prevail over a general provision of the election laws referred to for closing polls at state and county elections at 5 o'clock P. M.

ID.—CONFLICT BETWEEN SPECIAL AND GENERAL LAW.—The charter being a law for a special case, is not in conflict with the general law providing otherwise; and an intent that the general law shall supersede the charter provision as to the time for closing the polls cannot be inferred from a general law which by its terms is applicable to state and county elections only, and which is only made applicable generally so far as practicable by the same charter which specially provides differently therefrom, as to the time of opening and closing of the polls at municipal elections.

ID.—ELECTION OF MAYOR—PREMATURE CLOSING OF POLLS—REJECTION OF VOTE OF WARDS.—In determining the election of a mayor, under a charter providing for keeping open the polls until sundown, the vote of wards which closed the polls at 5 P. M. is properly rejected, although the majority of the voters of the city are thereby disfranchised. The election in such wards is to be treated as illegal

and void, and as if no election was held therein; and the vote in a remaining ward, in which the polls were closed at sundown, must determine the election.

APPEAL from a judgment of the Superior Court of Monterey County. M. T. Dooling, Judge.

The facts are stated in the opinion of the court.

S. F. Geil, C. F. Lacy, and J. W. Bryan, for Appellant.

It was the intention of the legislature that the general election law should control, and the change therein should be held to control any contrary provision of the charter. (*Kirk v. Rhoads*, 46 Cal. 398; *Staude v. Election Commrs.*, 61 Cal. 315; *People v. Henshaw*, 76 Cal. 436; *Thomason v. Ashworth*, 73 Cal. 73; *Anderson v. De Urioste*, 96 Cal. 405; *Santa Cruz v. Enright*, 95 Cal. 111; *Davies v. Los Angeles*, 86 Cal. 37.) An election is not a "municipal affair" within the meaning of the amendment of 1896 to section 6 of article XI of the constitution. (Compare Const., art. IV, sec. 25, subd. 9.) The judgment declaring a candidate elected, who received a minority of the votes cast, is erroneous. The case is no different in principle from one where the person receiving a majority of the votes proves ineligible. His having received a majority of the votes precludes the court from declaring his antagonist elected. (*Saunders v. Haynes*, 13 Cal. 145; *Searcy v. Grow*, 15 Cal. 118; *Crawford v. Dunbar*, 52 Cal. 36; *People v. Rodgers*, 118 Cal. 396; *State v. Giles*, 2 Pinn. 166; 52 Am. Dec. 149.)

William F. Fitzgerald, Attorney General, and Renison & Jones, for Respondent.

The charter necessarily implied that any provisions of the general election laws inconsistent with the special provisions of the charter were not applicable. (Rapalje and Lawrence's Law Dictionary, ed. 1888, 1102; *Christy v. Board of Supervisors*, 39 Cal. 3; Endlich on Interpretation of Statutes, sec. 223; *Crosby v. Patch*, 18 Cal. 439; *Pennie v. Reis*, 80 Cal. 269.) The general election laws are not by their terms applicable to municipal elections, and do not control the special provisions of the municipal charter. (*Wood v. Election Commrs.*, 58 Cal. 561.) Under the constitutional amendment of 1896, no general law can control a city charter

in respect to "municipal affairs." (Const., art. XI, sec. 6.) The deviation from the legal time of closing the polls being substantial, and it being impossible to tell what would have been the result of the vote in the wards prematurely closing the polls, if they had been kept open for the legal time, the vote in those wards is illegal and void, and must be rejected. An election in a precinct or ward which is a nullity can have no legal effect whatever. (*People v. Scale*, 52 Cal. 71; *Directors etc. Dist. v. Abila*, 106 Cal. 365; *Tebbe v. Smith*, 108 Cal. 101, 111, 112; 49 Am. St. Rep. 68; *Atkinson v. Lorbeer*, 111 Cal. 419, 422, 423; McCrary on Elections, 4th ed., 127, 128.) A minority of legal votes will prevail against any number of illegal votes actually cast. (*Commissioners v. Read*, 2 Ashm. 261; *People v. Board of Convassers*, 129 N. Y. 395.)

TEMPLE, J.—This action is for usurpation of the office of mayor of Salinas City. The city was reincorporated by special act of the legislature passed in 1876. In section 5 of that act it is provided as to municipal elections, among other things, that "all provisions of law regulating elections for state and county officers shall apply, as far as practicable, to elections under this charter. The polls for al elections shall be opened at such hour as may be designated by the mayor and common council in giving notice of said election; provided, that the hour for opening the polls shall in no case be later than the hour of 2 o'clock P. M., and the polls shall not be closed until sundown of the same day."

A municipal election was held on the 14th of March, 1898, at which Francee, at whose instance this suit was brought, and Hill, defendant, were candidates. The proclamation calling the election directed that the polls should be opened at sunrise and closed at sundown. The general election law for state and county officers directed that the polls shall be closed at 5 P. M. There are three wards in the city. In two they followed the state law and closed the polls at 5 o'clock P. M., which was found to be one hour and six minutes before sundown. Counting the votes from all the wards Hill would have a majority of twenty-four, and he was declared elected by the council.

Rejecting the votes cast in wards 1 and 2 as illegal, Francee

would be elected by a majority of twenty-two, and this conclusion was reached by the trial court and Hill takes this appeal.

It is contended by the appellant that the language of the section providing that so far as practicable the general election law shall apply, indicates the intent that the general law should govern all city elections. If this were so, it is difficult to see why anything was said in the charter about the time for opening and closing the polls, and in regard to many other things mentioned in section 5. It is suggested that it was intended to provide that the polls need not be opened until 2 o'clock P. M., but to make no change as to the hour of closing, for then the general law directed that the polls be closed at sundown, which time was afterward changed to 5 o'clock P. M., and, we may add, might be changed to 2 o'clock P. M. But it seems perfectly manifest that the permission given to the council by its proclamation to fix a later hour for the opening of the polls than that fixed in the general law, and the requirement that the polls must not be closed before sundown, are parts of the same provision. The absolute requirement is because of the power given the board to delay opening the polls. Where but few votes would be cast it is not necessary that the polls should be kept open all day, but it is a wise provision which directs that, even then, voters may know that at all events the polls will be kept open for a certain designated portion of the day.

Even if this were not so, there is no more ground for holding that the provision that the council may designate a different time for opening the polls than that fixed by the general law shall stand as an exception, than that the imperative requirement of the charter that the polls shall not close before sundown shall exist as an exception, notwithstanding the general law. As already stated, both are coupled with the provision making the general law applicable, and are purposeless if notwithstanding the general law is to control in such matters; for the general election law must always provide for opening and closing the polls.

The charter being a law for a special case is not in conflict with a general law which provides otherwise. Even a general law subsequently passed does not repeal laws expressly

made for special cases, unless an intent that the general law shall have such effect is manifested in some mode in the general law. This intent may be shown in various ways, but assuredly cannot be found in a statute which is expressly made applicable to state and county elections only. The decisions rendered in *Staude v. Election Commrs.*, 61 Cal. 313; *Thomason v. Ashworth*, 73 Cal. 73; *People v. Henshaw*, 76 Cal. 436, and other cases cited, have no bearing whatever upon this matter. In those cases the statutes expressed a design to control and repeal the special laws, and the only questions considered were as to power of the legislature to pass such laws—not as to the construction of the statutes. Here it is the charter which makes the general law applicable so far as it is so, for in form and words the general law excludes the idea that it has any application to the charter election. Provision in a statute for a special case is not deemed repugnant to the general law, but an exception. But as the general law is in terms not applicable to this particular case, and the attempt is to show that it is expressly made applicable by the special law, neither the decisions cited nor the rule of interpretation are of consequence here.

It is said that under the ruling a majority of the voters are disfranchised, and that under such circumstances no one should be declared elected. No authority is cited for this proposition, and clearly it is for the legislature to determine the effect of such a failure. Whichever way the rule is made unscrupulous managers can take advantage of it to defeat the popular will—if they are permitted so to do. It is not like the case where a majority of votes are cast for one who is ineligible. There the votes are legally cast and counted, but a person has been elected who is not qualified to serve, and it is also true that the opposing candidate did not receive a majority of the legal votes. There the votes may be canvassed and full return made of the result, which will be received and counted, but in this case the election in the offending precincts is declared void and no election was held therein. There are, therefore, no returns to canvass.

The judgment is affirmed.

McFarland, J., and Henshaw, J., concurred.

[S. F. No. 959. Department Two.—June 9, 1899.]

**WILLIAM LYNCH, Respondent, v. CALVIN PEARSON,
Appellant.**

USE AND OCCUPATION—SALE UNDER FORECLOSURE—RESCINDED CONTRACT.

An agreement between a mortgagee and the son of a mortgagor who was living on the mortgaged premises with his father, that the mortgagor would obtain title under foreclosure, and convey it to the son, on certain terms specified, which was mutually rescinded after the son had made a small payment thereon, does not relieve him from liability to the mortgagor for use and occupation after such rescission, and after purchase by the mortgagor at the sale under the foreclosure; and a judgment for the value thereof, less the payment made under the agreement, will be affirmed.

ID.—CONTRACT OF SALE—POSSESSION NOT TAKEN UNDER VENDOR—EXCEPTION TO RULE.—The rule that one who enters by virtue of a contract of sale of the premises is not thereafter liable to an action for use and occupation, has no application where possession was not taken under the contract, and the vendor had no power to put the purchaser in possession, but the contract of sale was made by a mortgagee to sell the title to be acquired under foreclosure to a party already in possession, and was rescinded before such title was acquired.

APPEAL from a judgment of the Superior Court of Fresno County and from an order denying a new trial. E. W. Risley, Judge.

The facts are stated in the opinion.

George E. Church, for Appellant.

A vendee in possession under a contract of purchase is not liable to an action for use and occupation. (*Greenup v. Vernon*, 16 Ill. 26; *Nance v. Alexander*, 49 Ind. 516.) It is immaterial whether the contract is carried out or not. (*Smith v. Stewart*, 6 Johns. 46; 5 Am. Dec. 186; *Carpenter v. United States*, 17 Wall. 489; *Little v. Pearson*, 7 Pick. 301; 19 Am. Dec. 289; *Thompson v. Bower*, 60 Barb. 463; *Vandenheuvel v. Storrs*, 3 Conn. 203.)

Frank H. Short, for Respondent.

The authorities cited by appellant have no application to the facts of the case.

COOPER, C.—Action to recover for use and occupation of premises. Judgment for plaintiff for three hundred and sixty dollars. Motion for a new trial, which was denied. This appeal is from the judgment and order. The court below filed findings, and in the brief of the appellant no finding is attacked for insufficiency of the evidence, and we will therefore take the facts as found by the court below and as admitted by the pleadings. On December 14, 1892, defendant was living upon the premises described in the amended complaint with his father, who was the owner thereof. Plaintiff was on said day the owner of a note secured by mortgage upon said premises, and while plaintiff was so the owner of said note and mortgage, and on said fourteenth day of December, 1892, defendant and plaintiff entered into an agreement whereby plaintiff agreed to foreclose his said mortgage and to bid in the lands therein described, and, upon receipt of a sheriff's deed, to execute to defendant a deed to said premises subject to a certain prior mortgage held by one Gray, and to take and receive from defendant his note and mortgage for the amount due the plaintiff on such foreclosure proceedings, and in consideration thereof the defendant agreed to pay the costs and attorney's fees in the foreclosure proceedings. According to the agreement plaintiff proceeded to foreclose the said mortgage, and on the twenty-fourth day of April, 1893, purchased the same at sheriff's sale and received the usual certificate. Defendant was in possession of the premises at the time he made the said agreement and never entered into possession thereof through or under plaintiff. After the plaintiff began foreclosure proceedings, and as necessary costs and attorney's fees in connection therewith, he paid the sum of one hundred and ninety-two dollars and fifty cents, of which sum defendant paid one hundred and forty dollars only. About October 1, 1893, the defendant and plaintiff rescinded the former agreement of December 14, 1892, and mutually released each other from the obligations thereof. After April 24th, up to October 24, 1893, the defendant continued in the possession of the premises and received the rents, issues, and profits thereof, and the value of such use and occupation during such time, to wit, from April 24 to October 24, 1893, was the sum of five hun-

dred dollars. There was not at any time any agreement between plaintiff and defendant as to the payment of rent, and the plaintiff never released the defendant from any obligation to pay rent. At the time the agreement of December 14, 1892, was made the plaintiff had no title to the premises therein referred to, and defendant never entered into possession under said agreement. The court below deducted the sum of one hundred and forty dollars, which had been paid by defendant to plaintiff under the agreement of December 14, 1892, from the value of the use and occupation, and gave judgment for three hundred and sixty dollars, and we think the judgment is correct. It gave the defendant the benefit of the one hundred and forty dollars which he had paid on the contract that had been canceled, and while, perhaps, the law in its strict construction would not have compelled it to be so applied, the court in a spirit of equity did so apply it. Appellant contends that the doctrine of vendor and vendee applied as between the plaintiff and defendant after December 14, 1892. It is the general doctrine that one who enters by virtue of an agreement or understanding that he was to be a purchaser is not afterward liable in an action for use and occupation, but the doctrine does not apply to defendant in the case for the reason that he did not enter under a contract with plaintiff. On December 14, 1892, defendant was already in possession of the premises by permission of his father, who was the owner of them. Plaintiff was not the owner, nor entitled to the possession, and hence had no power to put defendant in possession. The defendant testified that after making the agreement with plaintiff he leased the premises of his father. The agreement made with plaintiff was in fact an agreement by which the plaintiff was to take legal proceedings and thus attempt to get the title. The defendant agreed to pay the cost of such legal proceedings, and plaintiff, if successful in getting the title, was then to convey defendant on certain terms specified. Before the defendant had paid all the costs of such proceedings, and before the title had passed to plaintiff, the contract was rescinded by mutual consent. Plaintiff was the purchaser of the property at foreclosure sale. It was never redeemed. Defendant was

the tenant in possession at the time of the sale, and so continued until the time for redemption expired.

The value of the use and occupation was five hundred dollars. These facts entitled the plaintiff to judgment.

We advise that the judgment and order be affirmed.

Haynes, C., and Chipman, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are affirmed.

McFarland, J., Temple, J., Henshaw, J.

[Sac. No. 541. Department Two.—June 9, 1899.]

HELEN JANE GRIMBLEY, Respondent, v. C. H. HARROLD, Appellant; and THE GRAND LODGE OF A. O. U. W. of CALIFORNIA, Respondent.

BENEFIT SOCIETY—CONTRACT OF MEMBER WITH BENEFICIARY.—The valid contract of a member of a benefit society, such as the Ancient Order of United Workmen, whereby he assumes to dispose of his interest in the beneficiary fund of the order—virtually the proceeds of a policy of life insurance—and agrees not to change the beneficiary in consideration of the payment by the beneficiary of all dues and assessments against such member, if not in conflict with the lawful conditions upon which the order grants the insurance, is effectual as against the subsequent attempt of the member to change or annul it.

ID.—BENEFICIARY CERTIFICATE—PROPERTY RIGHT—POWER OF JUDICATORIES.—The beneficiary certificate issued to the member, like a policy of insurance, evidences a valuable right of property, of which he may dispose by valid contract; and it is not competent for the order, while clothing the member with such right, to confer upon its internal judicatories the sole power of determining the fact and consequences of any disposition which he may make of it.

ID.—RIGHTS OF BENEFICIARY—DECISION OF BOARD OF ARBITRATION—APPEAL—JURISDICTION OF COURTS.—The decision of the board of arbitration of the order upon the rights of a beneficiary who is not a member of the order is not conclusive as to those rights; and the beneficiary is not bound to appeal therefrom to the grand lodge, but may submit to the jurisdiction of the courts of the state the questions whether the member contracted with the beneficiary, as alleged, and what rights, if any, were thereby acquired.

ID.—PRESENTATION OF PROOFS—ARBITRATION.—The presentation of proofs by the beneficiary to the order cannot convert a hearing before a committee of the order, in whose selection the beneficiary had no choice, into an arbitration binding upon the beneficiary; and it is immaterial that such committee is called a board of arbitration.

ID.—CHANGE OF BENEFICIARY—SUPERIORITY OF RIGHT—ESTOPPEL—NOTICE PUTTING UPON INQUIRY.—Upon an attempted change of beneficiary by the member, after having disposed of his rights by valid contract with a prior beneficiary, the newly-appointed beneficiary cannot claim a superior equitable right, nor an estoppel, as against the prior beneficiary, merely because no information was given as to the terms of the contract under which the prior certificate was held when its surrender was demanded by the member, it being sufficient to put the new beneficiary upon inquiry as to the ground of the claim of the former beneficiary that he had notice that the right of the member to change the certificate was denied by the prior beneficiary.

ID.—CONSIDERATION OF CONTRACT—PLEADING—EVIDENCE—FINDINGS.—Under a complaint alleging that the consideration of the contract pleaded was the agreement of the beneficiary to pay all dues and assessments against the member, evidence that part of the consideration was that care was bestowed on the member, who was an uncle of the beneficiary, during his illness, is admissible and relevant as tending to make probable the matter averred; and a finding based upon such evidence is not prejudicial, if not within the issues, when the facts found within the issues show a valid contract.

EVIDENCE—CROSS-EXAMINATION—DISCRETION—APPEAL.—The extent to which the cross-examination of a witness shall be carried is, in some degree, a matter of discretion in the trial court; and its ruling will not be disturbed upon appeal if no abuse of discretion appears.

APPEAL from a judgment of the Superior Court of San Joaquin County and from an order denying a new trial. Edward I. Jones, Judge.

The facts are stated in the opinion.

Budd & Thompson, for Appellant.

Plaintiff must make out a case against Harrold that would entitle her to recover against the order. (Niblack on Benefit Societies, secs. 222, 354; *Ballou v. Gile*, 50 Wis. 614; *Keener v. Grand Lodge*, 38 Mo. App. 543; *Wendt v. Iowa Legion of Honor*, 72 Iowa, 682; *McLaughlin v. McLaughlin*, 104 Cal. 171; 43 Am. St. Rep. 83; *Chosen Friends v. Bennett*, 47 N. J. Eq. 39.) If plaintiff was not bound by the by-laws to submit her claim to the board of arbitration, by submitting it, the law implies an agreement from the fact of such submis-

sion to be found by the judgment of the board. (*Robinson v. Templar Lodge*, 97 Cal. 62.) When a suit has been brought to recover benefits, it is a good defense to show that plaintiff has agreed to submit her demand to the tribunals of the order for decision under prescribed rules, and that she has not done so. (*Robinson v. Templar Lodge*, 117 Cal. 370; 59 Am. St. Rep. 193; *Levy v. Magnolia Lodge*, 110 Cal. 297.) If the by-laws of an order prescribe it, beneficiaries must first resort to the tribunals of the order before an action can be maintained in the civil courts. (*Canfield v. Great Camp*, 87 Mich. 626; 24 Am. St. Rep. 186.) Even if there was the contract between plaintiff and Shelton alleged in the first count of the complaint plaintiff thereby acquired no vested interest in the certificate or its proceeds. (*Jory v. Supreme Council*, 105 Cal. 28; 45 Am. St. Rep. 17.) Harrold was an innocent beneficiary, without notice of the contract with plaintiff, and he has superior equities. (*Jory v. Supreme Council*, *supra*.) Equity will not permit plaintiff to take advantage of her own wrong. (*Hoelt v. Supreme Lodge*, 113 Cal. 91.)

C. B. Parkinson, for Plaintiff, Respondent.

It was necessary that plaintiff should apply to the order for payment, otherwise a suit would have been prematurely brought. (*Robinson v. Irish-American B. Soc.*, 67 Cal. 135.) There was no submission to arbitration. (*Kumle v. Grand Lodge, A. O. U. W.*, 110 Cal. 204, 210-12.) The rule that a member must exhaust his remedies in the order does not apply to such a case as this. (1 Bacon on Benefit Societies, sec. 94; 2 Bacon on Benefit Societies, sec. 400a; *Splawn v. Chew*, 60 Tex. 533; *Martin v. Stubbings*, 126 Ill. 387; 9 Am. St. Rep. 620; *Jory v. Supreme Council, etc.*, 105 Cal. 26; 45 Am. St. Rep. 17.) Payment of the money into court is a waiver by the order of its by-laws. (1 Bacon on Benefit Societies, 633; *Adams v. Grand Lodge*, 105 Cal. 321; 45 Am. St. Rep. 45.) Parties cannot by agreement oust the courts of jurisdiction. (*Kumle v. Grand Lodge, A. O. U. W.*, *supra*.) Plaintiff had a vested interest under her contract. (*Jory v. Supreme Council, etc.*, *supra*. *Hoelt v. Supreme Lodge, K. of H.*, 113 Cal. 91; *Yore v. Booth*, 110 Cal. 238; 52 Am. St. Rep. 81; *Smith v. National Ben. Soc.*, 123 N. Y.

850; *Maynard v. Vanderwerker*, 30 Abb. N. C. 134; 24 N. Y. Supp. 932.)

BRITT, C.—There was evidence at the trial of this action that in the summer of the year 1894 the plaintiff, a young woman, upon the request and at the expense of one Frederick Shelton, her uncle, left her home in England and came to this state, where said Shelton resided, for the purpose of caring for him in sickness; he proposing in rather indefinite terms to make some provision for her, saying, among other things, that he had some papers he wanted her to have. Shelton was then and had been for several years previously a member of the society called the Ancient Order of United Workmen, which has for one of the purposes of its organization the payment of a sum of money—two thousand dollars—upon the death of any member “to such person as he may while living direct, according to the rules, laws, and regulations of the order”; he held the usual “beneficiary certificate,” declaring his right of membership in said order and his right to designate the beneficiary of said fund. The rules, laws, and regulations aforesaid allow any member to change his direction for payment of such money, and on August 16, 1894, Shelton surrendered the said certificate previously issued and obtained from the defendant Grand Lodge of said order the issuance of another, wherein he designated the plaintiff as the beneficiary thereunder; which new certificate he at once delivered to the plaintiff. Regarding this transaction, the plaintiff alleged in her complaint, and the court found in substance, on sufficient evidence, that at and prior to the time of the delivery of such certificate to plaintiff it was agreed between Shelton and herself that she should thereafter pay all his dues to said order and all assessments levied by it against him, and that she should be the beneficiary to receive said sum of two thousand dollars at his death, and that he would not change the certificate in that behalf; that plaintiff accordingly did pay such dues and assessments after said August 16, 1894, and until July, 1895, when the order declined to receive the same from her further, for the reason that Shelton, in April, 1895, had again changed the designation of the beneficiary of his insurance, naming

the defendant Harrold, and had procured a new certificate to be issued in Harrold's favor, although plaintiff did not consent to such change and still held the certificate of August 16, 1894, and refused to surrender the same. The court also found, though this circumstance was not alleged in the complaint, that plaintiff further undertook, as part of her said agreement with Shelton, that she would personally care for him as long as she was able, and that she performed this promise except as excused or prevented by Shelton from so doing. There were other findings that besides procuring the new beneficiary certificate of April, 1895, in Harrold's favor, Shelton also conveyed to him other property, real and personal—all upon certain trusts which Harrold undertook to execute; that out of funds thus derived Harrold paid certain debts of Shelton and his dues and assessments as a member of said order in July and August, 1895; and that Harrold had no knowledge of any contract between Shelton and plaintiff respecting said insurance money until after Shelton's death, but did know of her refusal to surrender the certificate she had received from Shelton or to consent to his proposed change of the beneficiary thereof. Shelton died August 18, 1895.

Among the rules of said order it is provided that a board of five members to be appointed by the grand master workman shall constitute "a board of arbitration to hear and determine all controverted questions which may arise as to the disbursement of the beneficiary fund under the control of the grand lodge, . . . and as to the liability of the grand lodge for any claim made against it by those claiming to be the beneficiaries of deceased members, and also as to who are entitled as beneficiaries when conflicting claims are set up"; and that the decision of said board shall be conclusive, subject to appeal to the grand lodge or supreme lodge, "it being the purpose of this provision that all these rights shall be thus determined without recourse to the courts of law." After Shelton's death plaintiff presented to said Grand Lodge her claim for payment of the said certificate of August 16, 1894, and her protest against payment of the subsequent certificate in favor of Harrold; whereupon, under the regulation just mentioned, the grand master appointed a board of arbitration

which heard such claim and protest and decided adversely to plaintiff. She took no appeal to any other tribunal of the order, but instead brought this action against said Grand Lodge and Harrold. The answer of the Grand Lodge herein is, in effect, that it holds the sum of two thousand dollars to be paid to the party which the court by its judgment may decide to be entitled to receive the same. Judgment went for plaintiff, requiring the Grand Lodge to pay the money to her, and declaring that defendant Harrold is not entitled to any part thereof. Harrold has appealed.

Decisions of the courts of other states differ regarding the effect to be given to the contract of a member in societies such as the Ancient Order of United Workmen, whereby he assumes to dispose of his interest in the beneficiary fund of the order—virtually the proceeds of a policy of life insurance; but the question is hardly an open one here—so strong have been the intimations of this court that such a contract, when valid and not in conflict with the lawful conditions upon which the order grants the insurance, is effectual as against the subsequent attempt of the member to violate or annul it; and this must be held to be the law. (*Jory v. Supreme Council L. of H.*, 105 Cal. 20, 29; 45 Am. St. Rep. 17; *Adams v. Grand Lodge A. O. U. W.*, 105 Cal. 325; 45 Am. St. Rep. 45; *Hoelt v. Supreme Lodge K. of H.*, 113 Cal. 91; *Leaf v. Leaf*, 92 Ky. 166; *Smith v. National Ben. Soc.*, 123 N. Y. 85; *Maynard v. Vandewerker*, 30 Abb. N. C. 134; 24 N. Y. Supp. 932.) The case last cited, which is precisely in point here, was decided at special term and the judgment was reversed on appeal upon a question of fact; but the opinion then delivered proceeds on the assumption that the law held by the trial judge was correct. (*Maynard v. Vandewerker*, 27 N. Y. Supp. 714; 76 Hun, 25.)

Appellant urges that, as plaintiff took no appeal from the decision of the board of arbitration, she is concluded thereby; that this is the effect of the laws of the order under which the beneficiary certificate was issued. But the certificate issued to Shelton, like a policy of life insurance, evidenced a valuable right of property, and we cannot concede that it was competent for the order, while clothing him with such right, to confer upon its internal judicatories the sole power of de-

termining the fact and consequences of any disposition he might make or attempt to make of it. Suppose Shelton had been permitted to designate a beneficiary by last will and testament; it would seem to be an extraordinary proposition to say that the society could confer on its own tribunals exclusive power to determine—in relation to the proceeds of the certificate—whether any will had been executed, allow or refuse it probate, and decide how it should be construed. The case before us is in principle but little different. The order in this instance has with entire fairness declared its indifference between the contending claimants, but the appellant, Harrold, insists that to entitle her to recover as against him the plaintiff must make a case on which she would be entitled to recover against the order, and cites some authorities to that effect. However that may be, we think the questions whether Shelton contracted with the plaintiff, as she alleged, and, if he did, what right she acquired in the subject of the contract, pertained to the jurisdiction of the courts of the political sovereign, the state, and it was not compulsory upon her to resort elsewhere. (*Burlington etc. Relief Dept. v. White*, 41 Neb. 547; 43 Am. St. Rep. 701; *Daniher v. Grand Lodge A. O. U. W.*, 10 Utah, 110; see, also, *Whitney v. Association*, 25 Minn. 378; Bacon on Benefit Societies, secs. 71; 450; *Moore v. Woolsey*, 4 El. & B. 243.) Nothing to the contrary was held in *Robinson v. Templar Lodge*, 117 Cal. 370; 59 Am. St. Rep. 193; that was a dispute between a member and the organization concerning rights founded immediately on the contract of membership, and which the member had, by assenting to its rules, agreed to submit to its tribunals. The plaintiff here is not a member of the order, and her cause of action contains an element wholly foreign to its laws, viz., her contract with Shelton.

It is contended, however, that plaintiff voluntarily left her demands to arbitration, and must abide by the result, even though the rules of the order in that behalf were not binding on her. The assumption of fact for this argument fails; the plaintiff presented to the Grand Lodge her demand for payment to herself and protest against payment to Harrold; this was a proper course, whatever other proceedings she designed to take; the Grand Lodge did not respond directly; her de-

mand and protest were assigned for hearing to the board appointed by the grand master; although called a board of arbitration it lacked, as concerned the plaintiff, a prime essential of a legal body of arbitrators in that she had no voice in selecting its members; it was really but a committee upon which under the rules of the order was devolved the duty of answering plaintiff's demand; the fact that she produced evidence before it to support her claims could not convert the hearing into an arbitration—any more than if she had presented her proofs before the Grand Lodge itself. (Compare *Kumle v. Grand Lodge A. O. U. W.*, 110 Cal. 204.)

Appellant claims that the court should have held his equitable right to receive the money to be superior to that of plaintiff. This is asserted mainly on the circumstance that plaintiff did not inform him of her contract with her uncle at the time the latter demanded the surrender of the certificate she held in order that a new one might be issued to Harrold. But it appears that Harrold knew that plaintiff held the certificate and that she denied the right of her uncle to deprive her of its benefits; this was sufficient to put him on inquiry as to the ground of her claim, and we cannot hold that she is estopped by failure to disclose to him particulars of which, so far as appears, he did not inquire.

It is objected that the court erred in receiving evidence that the plaintiff bestowed care on her uncle during his illness, and that this was part of the consideration for his agreement to make her the beneficiary of his insurance—on the ground that the complaint contained no allegation that she agreed to render such attentions; it is said also that the finding on this subject was beyond the issues. But the evidence tended to exhibit the relative situation of the parties toward each other and hence to make more probable the matter which was averred, viz., that Shelton, in consideration of her payment of his dues and assessments, agreed that she should receive the insurance; it was therefore relevant. And if the finding was beyond the issue—which we do not decide—yet, as the facts found *within* the issue were sufficient evidence of a valid contract, the appellant is not injured.

Plaintiff testified that she paid her uncle's dues and assessments, as she agreed with him, from her earnings at domestic

service. On cross-examination counsel sought to ascertain whether she had funds sufficient for this purpose—with a view apparently to showing that the money she paid was really furnished by Shelton; she testified that she took some instruction in music, but paid for it out of her own money; counsel inquired how much she paid for the lessons, and the court sustained an objection to the question. Perhaps the question was proper cross-examination in the abstract; but the ultimate matter to be developed by this line of inquiry was whether she paid the assessments from funds supplied for that purpose by her uncle, and upon this it appears that appellant's counsel did examine her fully and educed quite explicit answers; the extent to which cross-examination shall be carried is in some degree a matter of discretion with the trial court, and we cannot say that in this instance its discretion was abused. Other points argued are not important. We discover no material error in the record. The judgment and order denying a new trial should be affirmed.

Gray, C., and Cooper, C., concurred.

For the reasons given in the foregoing opinion the judgment and order denying a new trial are affirmed.

McFarland, J., Temple, J., Henshaw, J.

Hearing in Bank denied.

[S. F. No. 1160. Department Two.—June 9, 1899.]

COUNTY OF SONOMA, Respondent, v. PETER N. STOFEN et al., Appellants.

ACTION AGAINST COUNTY TREASURER—CONVERSION OF MONEY—DEFENSE OF ROBBERY—CLEAR PROOF REQUIRED.—In an action against a county treasurer and the sureties on his official bond, for the alleged conversion by him of county funds, it is a proper defense that the treasury was robbed of such funds; but such defense must be clearly and satisfactorily established.

ID.—PROVINCE OF JURY—REJECTION OF SUSPICIOUS TESTIMONY.—Although the evidence of one witness, if credited, is sufficient to establish the defense of robbery, yet the jury are not bound to give credit to the account of the robbery given by the defendant, and may reject it, if there are circumstances of doubt and suspicion attending his account of it, which give basis for an argument against its probability.

ID.—EVIDENCE—EFFORTS TO ESCAPE FROM VAULT—COMPARATIVE EXPERIMENTS.—Where the treasurer testified that he was locked by robbers in the vault, and was confined there eight hours, and that he kicked upon the inner door with all his might, but did not kick or strike upon the sheet-iron lining of the sides of the vault, the construction of which was known to him, and that he occasionally heard footsteps passing outside—comparative experiments are admissible which tend to show that if his story were true, and he wished to give an alarm, and escape promptly from the vault, blows upon the resonant sheet-iron sides of the vault would have been much louder and more effective than kicks upon the inner door, if there is nothing to indicate that different atmospheric conditions would have materially affected the result.

ID.—VALUE OF EXPERIMENTAL EVIDENCE.—Experimental evidence in corroboration or disproof depends for its value upon the fact that the experiment was made when the conditions affecting the result were substantially identical; but this identity need not extend to nor be shown to exist, as to conditions which have had no causal operation upon the result.

NEW TRIAL—NEWLY-DISCOVERED EVIDENCE.—A new trial cannot be granted for alleged newly-discovered evidence when it appears that the knowledge of such evidence was in the possession of the moving party, while the case was pending, and he did not see fit to avail himself of the benefit of it.

APPEAL from a judgment of the Superior Court of Sonoma County, and from an order denying a new trial. S. K. Dougherty, Judge.

The facts are stated in the opinion of the court.

J. R. Leppo, Ed. C. Barham, and J. A. Barham, for Appellants.

Emmett Seawell, District Attorney of Sonoma County, for Respondent.

HENSHAW, J.—This is an action brought by the county of Sonoma against Stofen, its ex-treasurer, and against his bondsmen, to recover the sum of seven thousand eight hundred and fifteen dollars and seventy-nine cents, alleged to have been converted by Stofen while he was treasurer. The defendants denied the conversion, and set up as a defense that Stofen had been robbed of the money. Judgment passed for plaintiff and defendants moved for a new trial. Upon denial of their motion they appealed, both from that order and from the judgment.

It is strenuously insisted that the uncontradicted evidence in this case establishes a robbery. The account of the affair given by the defendant Stofen is as follows: Upon the morning of the twenty-eighth day of December, a Friday morning, he had gone to his office in the county courthouse in the city of Santa Rosa. He entered his rooms at about the usual hour, at 9 o'clock, or a few minutes thereafter. He opened the outer and inner doors of the vault in his office and proceeded to take out the drawers or money trays for use in his daily business. Turning round with a tray in each hand, he confronted a man with an uplifted dagger who ordered him to drop the trays. "This is the last that I knew. I felt no blow, and did not see him strike me, but I presume as I put down the money he struck me on the back of the head, because that is where I had a lump and discoloration of the skin. That is the last I knew until I came to in the vault, and I was lying on my back with my head right under the opening of the vault door. The first thing that I realized after I came to, I raised up and bumped my forehead again on the metal. That threw my head back again on the floor, and I felt up around, and I felt the safe floor. Then I comprehended for the first time where I was. I remained in the vault until I was taken out by my wife. They said it was about half past 4 in the afternoon of the same day." He further testified that the money, which was in its proper place at the time he entered the vault in the morning, was taken. From time to time during his imprisonment he kicked upon the door with all his might, "and that made a great racket." Mrs. Stofen, wife of the defendant, testified that in the afternoon of that day, visiting the courthouse in search of her husband, she became alarmed at his absence. She procured the jaintor to unlock the outer door of her husband's office, and entered the room with one or two others. She saw her husband's overcoat and hat on the desk and became greatly excited. She thought she heard a noise in the other room, which was the room containng the vault, and Judge Moore said, "He is in the vault." She hurried to the vault door and tried the combination, which she knew, but, being excited, she did not succeed the first time in opening the door. Judge Moore stood by her, endeavoring to calm her, and in

time she succeeded in opening the outer door. Then she had to unlock the inner sheet-iron door. The key of this door, upon the bunch of defendant's keys, was in the lock. Opening the door, her husband was found dazed and weak. There was an injury, a bruise upon the back of his head, a swelling and discoloration. J. H. Wise and A. P. Moore accompanied Mrs. Stofen when she unlocked the vault. Their testimony corroborated hers, saving that Wise says he could not say whether Mrs. Stofen actually unlocked the inner door or not, or whether the inner door was locked or not. Moore could not testify whether the inner door was locked or not. He states that as they were going from the front room to the inner room Mrs. Stofen, who was very much excited, exclaimed: "Oh, they have locked my husband up!" These two witnesses agreed in their account of the distressed condition of Stofen when released from the vault, but neither observed any injuries to his person.

This account of the robbery stands uncontradicted and unimpeached by any direct evidence in the case. So much must be conceded, and under this concession appellants contend that the decision is unsupported by the evidence. But, while it is true that uncontradicted evidence of a positive fact must generally be controlling, there are exceptional cases in which the jury or the judge as a trier of the facts is held justified in rejecting uncontradicted evidence, even the most positive. In *Quock Ting v. United States*, 140 U. S. 417, Mr. Justice Field uses this language: "Undoubtedly, as a general rule, positive testimony as to a particular fact, uncontradicted by anyone, should control the decision of the court; but that rule admits of many exceptions. There may be such an inherent improbability in the statements of a witness as to induce the court or jury to disregard his evidence, even in the absence of any direct conflicting testimony. He may be contradicted by the facts he states as completely as by direct adverse testimony, and there may be so many omissions in his own account of particular transactions, or of his own conduct, as to discredit his whole story. His manner, too, of testifying may give rise to doubts of his sincerity, and create the impression that he is giving a wrong coloring to material facts. All these things may properly be considered in determining the weight which should be given to his statement, although there be no adverse verbal testimony adduced." To like effect are the cases of *Blankman v. Vallejo*, 15 Cal. 639, and *People v. Milner*, 122 Cal. 171.

Are any of these elements of doubt or suspicion present in this case, and, if so, are they sufficient to have warranted the court in finding against the defense of robbery? In this, as in all such cases where the question has arisen, the offered evidence is the evidence of a person directly interested in the outcome of the litigation. This fact itself is a circumstance of importance in weighing the testimony given. With the manner of a witness upon the stand, and with his deportment under examination, circumstances which have always been recognized as affecting one way or the other the credibility of his testimony, this court can have nothing to do; but when the matter of defendant's testimony is considered and analyzed, it will certainly be shown to present features of suspicion and doubt. To begin with, it is extraordinary that in the city of Santa Rosa, upon the morning of a business day, one or more robbers could have thus assaulted the treasurer in a public building containing the courts and offices of the county officers, have robbed him, have locked him in the vault, and have escaped with their plunder without leaving the slightest clew to or trace of their identity or whereabouts. Again, the robbery took place but a few days before the expiration of the defendant's Stofen's term of office, and, consequently, but a few days before it was necessary for him to turn over the county funds to his successor. This is but a circumstance, and nothing more, but it certainly gives room for suspicion that this extraordinary robbery should have taken place at so opportune or inopportune a time. Moreover, the vault in which the treasurer was locked was incased upon three sides with sheet-iron, the fourth side being the iron door. These facts were well known to Stofen. A blow upon the sheet iron produces a loud, resonant sound, like that of a bass drum, and can be heard for considerable distances throughout the building. Yet Stofen, by his own testimony, although he could hear sounds which he thought were steps in the corridor outside, never struck the sheet iron walls of his prison. He did kick upon the iron door many times he says, but there is upon this point at least the negative testimony of other occupants of the building that they never heard or noticed any such sound. Again, if it were established that Stofen was found locked in the vault, and that

he could not so have locked himself therein, it would tend very strongly to corroborate his account of the robbery, for there is not the slightest pretense that there was anyone in Santa Rosa upon that morning who acted as his confederate; but upon this it is shown that the bolts of both doors to the vault may be shot in place by anyone who is inside, and, while the shooting of the bolts does not lock the doors in the sense that the combination must be employed upon the one and the key upon the other to open them, yet it creates the appearance of their being locked. Mrs. Stofen and those who were with her assumed that the outer door of the vault was locked. The first time she essayed the combination she failed, and this, of course, actually set the lock. As to the inner door in which the bunch of keys was found, she testified that she unlocked it. She herself was under great excitement, and may have been mistaken. Certainly, she was not a wholly disinterested witness, and neither of the two who accompanied her testified to the unlocking of this inner door.

It is the law of this state that robbery is a defense to an action for the recovery of public moneys. (*Healdsburg v. Mulligan*, 113 Cal. 205.) The evidence of one witness entitled to full credit is sufficient to prove the robbery. (Code Civ. Proc., sec. 1844.) But the evidence of a defendant so situated does not as a matter of legal compulsion command this full credit. Robbery is a defense which may be easily simulated, and the temptation to do so must needs be strong upon one who has misappropriated trust funds. In consideration of these facts it is not insisting upon too much to say that the defense must be satisfactorily established. If it be an honest defense, this in the great majority of instances can readily be done. If exceptional cases shall arise where the defense is rightful, yet conviction of its truth is not brought home by the evidence, it must be remembered that the imperfect machinery of the law cannot always measure out perfect justice, and that public policy forbids putting a premium upon speculation by permitting this facile defense to be too lightly established. We think it unnecessary to enlarge

further upon the question. What has been said is not designed as expressing this court's opinion of the evidence, but it is in illustration of the fact that the trial judge, who rejected the evidence of the robbery because of the circumstances of doubt and suspicion attending the account of it, was, under the exceptional features of this case, justified in so doing, and that his finding in this regard cannot here be disturbed.

Defendant Stofen testified that while in the vault he kicked many times upon the inner door with the heels of his boots, and that "it made a great racket." He further testified that he did not kick or strike upon the sheet-iron lining of the sides of the vault. He knew its general construction and that there was a hollow space several inches in diameter between the sheet iron and the brick outer wall. Evidence was offered and admitted touching experiments made by striking with clinched hands and books of account upon the sheet-iron sides, and also of experiments made by striking or kicking upon the inner door. Witnesses stationed in different parts of the building testified to hearing the sounds of these blows, and that those from the blows upon the sheet-iron sides were much louder than those from the blows upon the door. The admission of this evidence is urged as error, because the atmospheric and climatic conditions are not shown to have been the same upon the two days; the condition of the courthouse was shown to have been different by the removal of one door between the treasurer's and sheriff's offices and the replacing of the wooden panels in the upper portions of the other doors with glass; further, that it was not and could not be shown that in any blows struck by the experimenters they used the same amount of force as that employed by Stofen, and finally, as to the blows upon the sheet-iron walls, that the evidence was pertinent to nothing in the case, for Stofen positively testified that he did not strike upon these walls at all.

Experimental evidence in corroboration or disproof depends for its value upon the fact that the experiment has been made when the conditions affecting the result are as near as may be identical with those existing at the time of and oper-

ating to produce the particular effect. An absolute identity is, of course, impossible, but a substantial identity must exist to give the evidence value. But this identity need not extend to nor be shown to exist as to conditions which could have had no causal operation upon the result. Thus, if a witness testified that at a given distance he had heard a gunshot, before experimental evidence in disproof could be admissible it might properly be required to be shown that the force and direction of the wind were the same upon both days. If the question were upon the stopping of a car within a specified distance by the use of a given brake, experimental evidence would be valueless unless it were shown that the experiment was made under like conditions as to the car, the brake, the amount of force used to set it, and the state of the track. If a witness should testify that from a particular spot he saw a certain act, evidence that he could not have seen from that spot because of an intervening building would be worthless unless it were also shown that the building was there at the time of the occurrence. So indefinitely might illustrations be multiplied, but, upon the other hand, it would be entirely immaterial in the instance last given whether the wind was blowing three or thirty miles an hour in one direction or another, while these would constitute most pregnant circumstances in determining how far a gunshot could be heard. So, in experimenting with the car-brake, it might be of no consequence whether it was done by day or by night, but to test the vision of a witness obviously similar conditions of light would be most material. The experiments here made went to the volume of sound and the distance of its audibility. It is not apparent that different atmospheric conditions or the structural changes in the building would have materially affected the result, and as to the force used the experimenter testified that he employed moderate force while Stofen testified that he kicked with all his might.

The witnesses stationed about the building agreed substantially in their accounts, the differences being such as would naturally be expected from their varying distances from the origin of the sound. The blows upon the door could be heard distinctly, but were not such as would have been likely to attract attention. The blows upon the walls were loud

and resonant like the beating of a bass drum, or the pounding of an iron boiler. The evidence as to the blows upon the door was admissible as experimental evidence. It was of little value, assuredly, since in the one case the witnesses stood with attentive ears to catch the expected sounds, while in the other case there was nothing to attract their attention. The admissibility of the evidence of the blows upon the wall rests upon a somewhat different ground. It was a matter of fair argument that if his story were true Stofen would have used every means to escape from confinement, and would have given an alarm; that with this knowledge of the vault and of its construction he would have pounded upon that part of it which naturally would have given out the greatest noise. It was permissible to support this argument by proof of the fact that, if he had done so, the alarm would certainly have been heard and his prompt release would have been assured. That he did not do so certainly gives basis to an argument against the probability of his story, for it is to be remembered that according to that story he was incarcerated for nearly eight hours, and that he never struck upon the sheet-iron walls, and yet within his prison he could occasionally hear the footsteps of those passing outside.

In support of their application for a new trial upon the ground of newly-discovered evidence, defendants presented the affidavit of one George E. Perry. Perry's affidavit is to the effect that upon the day of the alleged robbery he was in charge of the steam-engine and heating apparatus in the Santa Rosa courthouse, during the temporary absence of his brother, who was the regular engineer in charge. In accordance with his practice he made a tour of inspection of the offices in the building to note their temperature and observe whether or not the heater was performing its work. Upon this particular morning, at a few minutes after 9 o'clock, as he approached the door of the treasurer's office, the door opened, and a man stepped out carrying a leather valise in his right hand. His appearance surprised the affiant, who thought that the treasurer was out of town. He stopped in front of the man and asked if the treasurer was in his office, to which the man replied yes, and hurried on. He tried one of the doors of the office and found it locked. He

passed on to the other door and found that also locked. He then concluded that the man had misunderstood his question, and had thought that he had inquired if that were the treasurer's office, and so attached no significance to the matter, until the evening of that day, when he learned that the treasurer's office had been robbed. He further deposed that in July or October, 1896, he related these facts to the defendant Stofen, but also stated to him that in attempting to open the side door he noticed upon it a placard stating that the treasurer was absent or out of town, and that at the time he so stated he believed that such was the fact, but "I may be mistaken, and I now believe that I am." After he had told Stofen about the placard, Stofen seemed to take less interest in his narration. Aside from the rigorous scrutiny, amounting to suspicion, with which newly-discovered evidence such as this should be regarded, the court was justified in refusing to grant a new trial, because in fact it was not newly-discovered evidence. Affiant's statement is, that he informed Stofen of these facts while the action was pending. It was evidence of the highest importance to the defense to show that a man with a valise in his hand was seen coming out of the treasurer's office upon the morning of the day of the alleged robbery, and at the time of day which Stofen fixes as the hour of its commission, regardless of the question as to whether or not there was a placard upon one of the doors stating that the treasurer was out of town. Aside from the dubious circumstance that the affiant declares that his present belief is that he was mistaken as to the placard, even if he had adhered to his first story in this regard, the evidence would still have been of vital moment. It is conceivable that the robber himself might have placed such a placard upon the door to avert inquiry. But, whatever may be the truth as to all these matters, the fact is, that knowledge of this evidence was in the possession of the defendant while his case was pending, and he did not see fit to avail himself of it.

The judgment and order appealed from are, therefore, affirmed.

McFarland, J., and Temple, J., concurred.

Hearing in Bank denied.

[S. F. No. 964. Department Two.—June 9, 1899.]

M. J. SMELTZER, Appellant, v. GEORGE S. MILLER,
Auditor of Monterey County, Respondent.

PRINTING OF DELINQUENT TAX LISTS—ADVERTISEMENT FOR BIDS—
POWER OF SUPERVISORS—RATIFICATION.—The board of supervisors
has no power to make a contract for the printing of the delinquent

tax list without a previous advertisement for bids, as required by statute; and not having the power to make such a contract in the first instance, they cannot call it into existence by subsequent ratification.

1D.—ALLOWANCE OF ILLEGAL CLAIM—INJUNCTION SUIT BY TAXPAYER—
LAW OF THE CASE.—A taxpayer may maintain a suit to enjoin the county auditor from drawing his warrant upon the county treasurer in favor of a publisher of the delinquent tax list, who had no valid contract with the board of supervisors for such publication, though the claim therefor has been allowed by the board of supervisors. *Smeltzer v. Miller*, 113 Cal. 163, affirmed, and held to be the law of the case.

APPEAL from a judgment of the Superior Court of Monterey County. N. A. Dorn, Judge.

The main facts are stated in the opinion rendered upon the former appeal, reported in 113 Cal. 163. Further facts are stated in the opinion rendered upon this appeal.

J. E. Alexander, for Appellant.

S. F. Geil, and P. E. Zabala, for Respondent.

GRAY, C.—All the questions involved in this appeal were stated by this court, thoroughly discussed and settled on the former appeal herein. (*Smeltzer v. Miller*, 113 Cal. 163.) Prior to that appeal the trial court had sustained a demurrer to the complaint, and this court, after reciting parts of the complaint, held that it stated a cause of action and that the demurrer should have been overruled. It appears that on the return of the case to the trial court an answer was filed and a trial had, and the fifth and sixth findings of the court are as follows:

“V. That on, to wit, the seventh day of June, 1894, the board of supervisors of said county of Monterey made and entered in the minutes of said board the following orders, to wit:

“ “This being the time fixed to hear the report of the committee heretofore appointed to propose the rate of county printing and furnishing blanks for one year, from June 10, 1894, to June 10, 1895, and said report is presented to the board, and by the board accepted, and so fixed; and the following prices as proposed by the committee are adopted, to wit:

“ “For printing the proceedings of board of supervisors, per

square of two hundred and forty ems, nonpareil, twenty-five cents.

“For ordinances, orders, notices, reports, et cetera, sixty cents per square for first insertion, and twenty-five cents per square for each subsequent insertion.

“For delinquent tax list, sixty cents per square for first insertion, and twenty-five cents per square for all subsequent insertions.

“On motion of J. T. Porter, seconded by T. J. Field, it is ordered that the minutes of the board of supervisors, and all orders, ordinances, notices, made by the board, and all printing ordered by the board of supervisors of Monterey county, be and are hereby awarded to the “Salinas Weekly Index” (a weekly newspaper printed and published in Salinas City) for one year, commencing June 10, 1894, and ending June 10, 1895.’ ”

“VI. That during the entire year of 1895 said board of supervisors of said Monterey county failed, neglected, and refused to advertise for bids for publication of the delinquent tax list of said county of Monterey for the year 1894-95, and said board of supervisors of said Monterey county failed, neglected, and refused to contract or award any contract for said publication with the lowest or any bidder after ten days, or any public or any notice that such contract would be let; that no sealed proposals or bids were ever received by said board of supervisors for the publication of said delinquent tax list, and the making of the orders of said board of supervisors mentioned in finding V were the only provisions made by said board of supervisors for the publication of said or any delinquent tax list.”

These findings show that the printing of the tax list was not even awarded to the newspaper mentioned, and, further, that there was no advertising for bids, no contract made with the board of supervisors for printing the tax list, that section 3766 of the Political Code, as amended in 1895, was not complied with, and that the complaint as set out and held sufficient in the former opinion of this court was absolutely true. This court has had occasion to approve its first decision herein in the case of *Harris v. Cook*, 119 Cal. 454.

The case at bar is clearly distinguishable from *Power v. May*, 114 Cal. 207, and the other cases cited by respondent,

holding that the board of supervisors may cure previous informalities by subsequent ratification and recognition of liability. In *Power v. May*, *supra*, the board had the power to make the contract, which it subsequently ratified (see *Power v. May*, 123 Cal. 147), but in the case at bar the board never had the power to make the contract for the printing, for the reason that they had not advertised for bids as required by the statute, and therefore they could not call into existence by subsequent ratification a contract that they had no power to make in the first instance.

The former decision of this court herein is not only correct, but it is the law of the case.

I advise that the judgment be reversed and the court below directed to enter judgment on the findings for the plaintiff in accordance with the prayer of his complaint.

Cooper, C., and Haynes, C., concurred.

For the reasons given in the foregoing opinion the judgment is reversed and the court below directed to enter judgment on the findings for the plaintiff in accordance with the prayer of his complaint.

McFarland, J., Temple, J., Henshaw, J.

[Crim. No. 528. Department One.—June 10, 1899.]

THE PEOPLE, Respondent, v. FRANK MILLER, Appellant.

CRIMINAL LAW—HOMICIDE—CHALLENGE TO JUROR—NEWSPAPER REPORTS

—PRIVATE STATEMENTS.—A challenge to a juror upon the trial of a defendant accused of murder, for actual bias, should be sustained, where the juror upon his *voir dire* states that besides reading newspaper accounts of the killing, he had heard statements of persons whom he had known for years, and who said they were true, and he believed them, though they might be mistaken, and that he would commence the trial of the case with an impressional opinion unfavorable to the defendant from what he had read and heard, subject to be changed upon the introduction of almost any evidence that would disprove it.

ID.—RIGHT TO IMPARTIAL JURY—EXCEPTION TO COMMON-LAW RULE—AFFIRMATIVE SHOWING.—The only exception to the common-law rule that the defendant is entitled to an impartial jury is declared in section 1076 of the Penal Code; and to sustain such exception the opinion of the juror must affirmatively appear to be founded alone upon public rumors, statements in public journals, or common notoriety.

ID.—SELF-DEFENSE—NECESSITY INDUCED BY FAULT—USE OF INSTRUCTION DISAPPROVED.—The instruction upon the law of self-defense, as to necessity induced by the fault of the defendant, taken bodily from the cases of *People v. Kennett*, 114, Cal. 18, and *People v. Roemer*, 114 Cal. 51, is unsound, aside from the qualification therein expressed; and though not erroneous, if given with that qualification, no good purpose can be subserved by giving it, and it should never be given.

APPEAL from a judgment of the Superior Court of Lassen County and from an order denying a new trial. F. A. Kelley, Judge.

The facts are stated in the opinion of the court.

E. V. Spencer, and H. D. Burroughs, for Appellant.

Tirey L. Ford, Attorney General, and C. N. Post, Assistant Attorney General, for Respondent.

GAROUTTE, J.—Defendant has been convicted of murder and sentenced to imprisonment for life. He now claims that a challenge interposed to the juror De Forest upon the ground of actual bias should have been allowed. The attorney general in his brief sums up the evidence of the juror upon his *voir dire* examination; this summation is a fair one, and fully as favorable to the people as the circumstances justify. Upon examination the juror said: "That he had read newspaper accounts of the killing; had heard the matter discussed by persons, but did not know whether such persons assumed to know the facts or not, but they made certain statements which they said were true. He did not know whether such statements were true or not. From what he had heard and read he had formed an opinion rather unfavorable to defendant—that is, if what he had heard and read was true. He did not know deceased nor who the witnesses were. It would take a little evidence to remove the opinion he had. He had no reason to disbelieve the statements he had heard. The only impression he had about the case was a sort of impressionable opinion formed from the statements he had

heard from others. If sworn as a juror he would try to lay aside his opinion entirely and act solely and entirely upon the evidence. He could not entirely dismiss the opinion from his mind. He was not a man that made up his mind from newspaper reports and rumors. His opinion would not have great weight with him in trying the case. He would commence the trial of the case with an impressional opinion subject to be changed upon the introduction and production of almost any evidence that would disprove it. He would regard the statement he had heard as entitled to but little weight. The statements were made by parties he had known for years, and whom he believed were telling the truth, and he believed them. He had some idea that they might be mistaken. He would take the instructions of the court as to the law."

Upon the foregoing state of facts the challenge to the juror upon the ground of actual bias should have been allowed. The juror went into the box with an opinion that the defendant was guilty. Such condition of the juror's mind was an absolute disqualification at common law. Under the Penal Code of this state a single exception is found to the common-law rule, and that exception is declared in section 1076. This juror was clearly disqualified, unless he came within the provisions of the aforesaid section. The exception found in the law covers the single case where the opinion of the juror is "founded upon public rumor, statements in public journals, or common notoriety," and it further appears to the court from the declarations of the party under oath, that he can and will, notwithstanding his opinion, act impartially and fairly upon the matters submitted to him. The court is not allowed to hold that a juror is qualified when he is impressed with an opinion as to the guilt or innocence of a defendant, unless that opinion is based alone upon one or more of the cases enumerated in the aforesaid section of the code. When the opinion is based upon one or more of these causes, then the court has a wide margin allowed it in weighing, measuring, and testing the party's declarations for the purpose of ascertaining his fairness and impartiality in passing upon the defendant's guilt or innocence. And here, if it appeared from the evidence that the opinion of the juror had

been formed from public rumors, newspaper articles, or common notoriety, the finding of the court as to his competency probably would not be disturbed; but we have no such showing. As far as this record discloses, any one of the parties with whom the juror conversed as to the circumstances of the killing may have been an eye-witness to the tragedy and an important witness at the trial. The record must show affirmatively a contrary state of facts to this, or the exception in section 1076 to the common-law rule cannot be invoked. There is nothing in the evidence which would justify the conclusion that the opinion of the juror was founded alone upon public rumors, statements in public journals, or common notoriety. This case, in principle, is directly in line with *People v. Wells*, 100 Cal. 227. It is there said: "But in order that a juror, disqualified at common law by reason of having previously formed an opinion as to the guilt or innocence of the accused, may come within this provision of the statute, it must appear affirmatively to the court from the evidence before it that such opinion is formed from public rumors or statements of public journals, or common notoriety."

Some other jurors were placed in the box whose competency came close to the border line, but it becomes unnecessary to consider the questions involved as to them.

The trial court gave an instruction to the jury upon the law of self-defense. This instruction was taken bodily from the cases of *People v. Kennett*, 114 Cal. 18, and *People v. Roemer*, 114 Cal. 51, where it was approved by a divided court. At the same time it was substantially said in the *Kennett* case that "trial judges are not advised to make further use of it." This instruction, aside from the qualification contained therein, is unsound. (See *People v. Button*, 103 Cal. 628; 46 Am. St. Rep. 259; *People v. Conkling*, 111 Cal. 616; *People v. Farley*, 124 Cal. 594. In the *Roemer* and *Kennett* cases it was held that this mass of bad law was so neutralized, and enriched for the better, by a qualification found at the end of the instruction as not to be absolutely vicious. To work such a result the qualification must have been held by the court to have had the effect of a very powerful antidote. But, in view of the holding made in those cases, the giving of the instruction here does not constitute

error. Yet no good purpose can ever be subserved by giving it, and it should never be done. There is nothing further disclosed by the record demanding the consideration of the court.

For the foregoing reasons the judgment and order are reversed, and the cause remanded for a new trial.

Van Dyke, J., and Harrison, J., concurred.

[S. F. No. 1063. Department Two.—June 13, 1899.]

W. DAVIS & SON, Appellants, v. HURGREN & ANDERSON, Respondents.

ACTION FOR BREACH OF CONTRACT—COUNTERCLAIM.—An action for the breach of a contract to deliver leather is an action "arising upon contract," and a counter claim may be set up by the defendant therein for goods sold and delivered; and it is immaterial whether such counterclaim arises out of the transaction set forth in the complaint under subdivision 1 of section 438 of the Code of Civil Procedure, or is founded upon an independent contract, under subdivision 2 of that section.

ID.—ALLOWANCE OF COSTS TO DEFENDANT.—Upon the failure of the plaintiff to recover in the action, costs are to be allowed as a matter of course to the defendant, notwithstanding the recovery, by the defendants of less than three hundred dollars upon their counterclaim.

MOTION FOR NEW TRIAL—DISMISSAL—STATEMENT—REVIEW UPON APPEAL.—The dismissal of a motion for a new trial is, in legal effect a denial of the motion, and when the motion was made upon the minutes of the court, a statement must be prepared by the moving party, in order that the motion may be considered upon its merits upon appeal from the order, upon other grounds than those specified in the order dismissing the motion.

ID.—NOTICE OF INTENTION—RECEIPT BY CLERK—NONPAYMENT OF FEES—INSUFFICIENT FILING.—A notice of intention to move for a new trial need not be filed by the clerk without the payment of the fee therefor in advance. The mere receipt of such a notice by the clerk on the last day for filing the same did not constitute a filing, where the clerk did not file it on account of nonpayment of the fees therefor; and a filing made three days thereafter, upon payment of such fees, though made as of the day of receipt of it by the clerk, at the request of the moving party, is too late, and cannot save the motion, and it is properly dismissed or denied.

APPEAL from a judgment of the Superior Court of Sonoma County and from orders denying a new trial, and denying a motion to strike out a cost bill. J. McMannon, Judge.

The facts are stated in the opinion of the court.

Lippitt & Lippitt, for Appellants.

Barham & Miller, for Respondents.

McFARLAND, J.—This is an action to recover of the defendants seven hundred and two dollars for the nonfulfillment by them of a contract to deliver to plaintiffs a certain amount of collar leather. The defendants by their answer deny the averments of the complaint, and set up as a counterclaim that plaintiffs are indebted to them for goods, wares, and merchandise sold, et cetera, in the sum of three hundred dollars. The jury returned a verdict for defendants in the sum of one dollar. Plaintiffs appeal from the judgment, from an order denying their motion for a new trial, and from an order denying their motion to strike out defendants' cost bill.

1. The counterclaim of the respondents was one proper to be pleaded. The court below seemed to think that the evidence showed that the counterclaim was one "arising out of the transaction set forth in the complaint," and therefore belonged to the class of counterclaims mentioned in subdivision 1 of section 438 of the Code of Civil Procedure; the evidence, however, is not before us, and, assuming it to be founded upon an independent contract, yet, as plaintiff's cause of action was clearly one "arising upon contract," the counterclaim was valid under subdivision 2 of said section.

2. The principal point urged by appellants is based upon the court's denial of their motion to strike out defendants' cost bill. Assuming that this matter can be reviewed either upon the appeal from the denial of the motion to strike out, or from the general judgment, the ruling of the court below was correct. Plaintiff's contention on this point is that respondents were not entitled to costs because the judgment in their favor was less than three hundred dollars; but this contention cannot be maintained. Section 1022 of the Code of Civil Procedure provides as follows: "Costs are allowed of course, to the plaintiff upon a judgment in his favor in the following cases: . . . 3. In an action for the recovery of money or damages when plaintiff recovers three hundred dollars or over"; and section 1024 provides that "costs must be allowed, of course, to the defendant upon a judgment in his favor in the actions mentioned in section 1022." If judg-

ment had been merely for the defendants generally, the point here insisted upon would hardly have been made, but the fact that they recovered a judgment in their favor for one dollar does not change at all the specific provisions of the code. This conclusion is clear upon principle, but the following authorities are directly in point. (*Dows v. Glaspel*, 4 N. Dak. 251; *Ury v. Wilde*, 3 N. Y. Supp. 791; 15 N. Y. Civ. Proc., 451.) In an action like the one at bar, unless the plaintiff is entitled to costs, the defendant recovers costs as a matter of course.

3. The transcript shows that the court "denied" the motion for a new trial, and also "dismissed" it upon the ground that notice of intention was not filed with the clerk in time. The court ordered the clerk to enter as a minute order what really is an opinion of the court below, in which he states why the motion for a new trial was dismissed. A dismissal of a motion for a new trial is really nothing more than a denial of it. (*Warden v. Mendocino County*, 32 Cal. 655.) In the case at bar, the motion was made upon the minutes of the court, and after its denial and "dismissal" the appellant did not prepare or present any statement upon motion for a new trial, as is required by the statute in such cases. We cannot determine, therefore, whether or not the motion for a new trial was properly denied upon other grounds; and, as a reversal of the order denying a new trial would be in substance the granting of a new trial, it is difficult to see how in the present state of the record this court would be warranted in granting a new trial without having any means of ascertaining what the merits of the case are. But, assuming that we can consider the motion solely upon the reason which the court gave in its opinion for denying it, we do not think that any error was committed. Section 639 of the Code of Civil Procedure provides that a party intending to move for a new trial must, within ten days after the verdict of the jury, file with the clerk his notice of intention. In the case at bar the ten days expired on the 23d of February. On that day the appellants sent their notice of motion to the clerk, but the clerk did not file the same because the fee therefor was not paid; and three days afterward, at the request of the appellants, who then paid the fee, the clerk indorsed it as filed February 23rd. The act of March 28, 1895 (Stats. 1895, p. 267, *et seq.*), provides that on the filing of a notice of a mo-

tion for a new trial the party filing the same must pay to the clerk a fee of two dollars, and that "county officers must . . . demand the payment of all fees in civil cases in advance." The notice, therefore, was not filed in time; the mere fact that the clerk received it on the 23d did not constitute a filing; it was not his duty to file it without the fee; he did not file it; and he could not have been compelled to file it on that day.

The judgment and order appealed from are affirmed.

Temple, J., and Henshaw, J., concurred.

[S. F. No. 975. Department Two.—June 13, 1899.]

C. C. WHEELER, Respondent, v. MARY ELLEN
KARNES et al., Appellants.

NEW TRIAL—DELAY IN SERVICE OF STATEMENT—ABSENCE OF EXCUSE—

REVIEW UPON APPEAL.—If a settled statement on motion for a new trial shows that the settlement thereof and the hearing of the motion were objected to on the ground that the proposed statement was not served within the time allowed by law, and that it was not served within ten days after service of the notice, it devolved upon the moving party to incorporate into the statement any matter excusing the delay; and if it does not appear therefrom that any extension of time was granted by stipulation or order, or that there was any excuse for the delay, the settled statement cannot be considered upon appeal; and it must be presumed that the findings were supported by the evidence, and that the rulings on the trial were correct.

APPEAL from a judgment of the Superior Court of Fresno County and from an order denying a new trial. Stanton L. Carter, Judge.

The facts are stated in the opinion.

W. P. Thompson, and G. G. Goucher, for Appellants.

Horace Hawes, and H. H. Welsh, for Respondent.

COOPER, C.—Action to recover judgment on a promissory note and for the foreclosure of a mortgage given to se-

cure the same. Findings were filed and judgment ordered for plaintiff. The judgment was entered November 19, 1896. Defendants made a motion for a new trial, which motion was denied, and this appeal is from the judgment and order. There is no attack made by defendants upon the judgment and no claim made that the judgment is not the legal conclusion from the facts found. It is sought to review an order denying a motion for nonsuit, certain findings as not being supported by the evidence, and certain alleged errors of law occurring at the trial, on appeal from the order denying a motion for a new trial. These alleged errors can only be reviewed upon a properly authenticated statement or bill of exceptions. The motion was made upon a statement of the case settled by the judge of the court below. We are met at the threshold with the objection that the statement cannot now be considered on this appeal for the reason that it was not served upon plaintiff's counsel within the time prescribed by statute, and we think the objection will have to be sustained. The notice of intention to move a new trial was served and filed November 28, 1896. The statute says (Code Civ. Proc., sec. 659): "If the motion is to be made upon a statement of the case, the moving party must, within ten days after service of the notice, or such further time as the court in which the action is pending or the judge thereof may allow, prepare a draft of the statement, and serve the same, or a copy thereof, upon the adverse party." The proposed statement was served January 6, 1897. It does not appear that the time for the service of the statement had been extended either by stipulation, or order of the court, nor that any amendments were proposed by plaintiff to said proposed statement. On the eighteenth day of March, 1897, the statement was settled, the plaintiff objecting to the settlement of the same on the ground that it was not proposed or presented to plaintiff within the time allowed by law. The learned judge of the court below thought that he did not have the power or authority to sustain the objection, and settled the statement subject to the objection so that this court might pass upon the validity of the objection. Plaintiff saved an exception to the action of the court in settling the statement, and it was accordingly settled subject to said ex-

ception. The same objection to the statement was made upon the hearing of the motion for a new trial, and the same ruling, and plaintiff excepted. In *Higgins v. Mahoney*, 50 Cal. 445, the bill of exceptions was presented after the time had expired, and respondent objected to its settlement on the ground that it was presented too late. The judge of the court below settled the bill, but incorporated the objection and exception in the statement. This court held that it had no power to consider the bill of exceptions and in the opinion said: "The right of the appellant to present a bill of exceptions, after the entry of judgment, is limited in point of time to the period of thirty days. After the expiration of that period, unless further time had been in the meantime obtained, the right to present the bill of exceptions is taken away. If, therefore, the respondents, objecting to the settlement of the bill of exceptions, rely upon the lapse of the period limited by the statute, it becomes the duty of the appellant, in answer to the objection, to incorporate into the bill the matter, if any, going to excuse his apparent delay; otherwise the exceptions, though settled, cannot be considered here." In this case the objection being made, and there being nothing in the bill or record accounting for or excusing the delay, we must follow the rule laid down in *Higgins v. Mahoney*, *supra*. The rule has been adopted and applied in the following cases: *Wills v. Rhen Kong*, 70 Cal. 548; *Bunnell v. Stockton*, 83 Cal. 319; *Connor v. Southern California, etc.*, 101 Cal. 429; *Tregambo v. Comanche etc. Co.*, 57 Cal. 503; *Henry v. Merguire*, 106 Cal. 144.

As we cannot examine the statement, it is presumed that the findings are supported by the evidence and that the rulings on the trial were correct.

We advise that the judgment and order be affirmed.

Chipman, C., and Haynes, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are affirmed.

Henshaw, J., Temple, J., McFarland, J.

Hearing in Bank denied.

[S. F. No. 1015. Department One.—June 14, 1899.]

THEODORE FOX, Appellant, v. JOHN W. MACKAY, et al., Respondents.

MINING CORPORATION—ACTION BY STOCKHOLDERS—FRAUDULENT MILLING OF ORE—BREACH OF CONTRACT—INSUFFICIENT COMPLAINT.—In an action by a stockholder of a mining corporation, for an accounting of ores claimed to have been fraudulently milled under a contract with a milling company, which provided that the ores "shall be worked in the usual and ordinary manner of working like ores, and returns therefrom shall not be less than seventy per cent of the pulp assay," a complaint alleging that seven hundred and thirty-four thousand tons of ore were milled under the contract and that said ores were milled in a very superficial and imperfect manner, and that less than seventy per cent was returned by the milling company to the mining company for more than forty-one thousand two hundred and seventy-five tons of ore, without stating how much less, or that the percentage was of the pulp assay, or when such tons of ore were milled, is not sufficient to support a judgment for the plaintiff.

ID.—CONSTRUCTION AGAINST PLEADER—RULE DE MINIMIS.—Under the rule that pleadings are to be construed against the pleader, it may be assumed that the allegation of "less than seventy per cent" is satisfied by a shortage of the smallest fraction of one per cent, and that the rule of *de minimis* would bar a recovery.

ID.—CONSTRUCTION OF CONTRACT—AVERAGE PERCENTAGE.—The contract with the milling company for the yielding of "not less than seventy per cent of the pulp assay" of the ores, rock, and earth worked is not to be construed as requiring seventy per cent of the pulp assay of each ton worked, but imports that upon a fair and honest milling of the ore the milling company was bound to return an average of at least seventy per cent of the pulp assay. Where it appeared that for four specified months the return to the mining company was less than seventy per cent of the pulp assay, but that the average of seventy per cent for the entire time was made up in the succeeding months, such average percentage is within the stipulations of the contract.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. J. M. Seawell, Judge.

The facts are stated in the opinion of the court.

H. G. Sieberst, for Appellant.

W. E. F. Deal, and Edmund Tauszky, for Respondent.

GAROUTTE, J.—This action is brought by Fox, a dissatisfied stockholder of the Consolidated California & Virginia Mining Company (a mining corporation), in behalf of the corporation against the Comstock Mill & Mining Com-

pany, J. W. Mackay, J. P. Jones, and the Consolidated California & Virginia Mining Company. Mackay and Jones are the real defendants in interest.

By the complaint conspiracy and fraud are alleged against Mackay and Jones in the milling of the ores of the Consolidated California & Virginia Mining Company, and an accounting is asked. Under the contract entered into between the mining company, and the milling company and Jones, by which the ores were to be milled, it was provided: "Said ores, rock, and earth shall be worked in the usual and ordinary manner of working like ores, and returns therefrom shall not be less than seventy (70) per cent of the pulp assay."

This appeal is taken from the judgment rendered against plaintiff, and the sole question raised revolves around a single allegation of the complaint, taken in connection with certain denials and allegations of the answer relating to the same subject matter. Plaintiff alleges that seven hundred and thirty-four thousand tons of ore were milled under the said contract with Jones and the milling company. And, after alleging various other matters, declares: "And for the fraudulent purposes above stated said ores were milled and crushed by the said Comstock Mill & Mining Company in a very superficial and imperfect manner, so that an unusually small percentage of the precious metals was extracted therefrom and returned to the said Consolidated California & Virginia Mining Company, and plaintiff enumerates that less than seventy (70) per cent was returned by said milling company to the said Consolidated California & Virginia Mining Company for more than forty-one thousand two hundred and twenty-five tons of the ore of the said Consolidated California & Virginia Mining Company milled and reduced by the Comstock Mill & Mining Company.

It is now claimed that this allegation of the complaint is admitted, and that by reason of such admission a breach of the contract as to a return of seventy per cent of the pulp assay is shown, and that therefore judgment to that extent at least should have gone for plaintiff. For various reasons there is no merit whatever in the point urged. Passing for a moment the sufficiency of the denials found in the answer bear-

ing upon this allegation of the complaint, we are satisfied the allegation itself is not sufficient to support a judgment. First, there is no statement in the allegation that the "seventy per cent" has any reference whatever to the pulp assay. As far as the allegation indicates it may have been any other assay. Again, invoking the rule that the pleading should be construed against the pleader, we may assume that this shortage under seventy per cent was the smallest fraction of one per cent, and such being the case the rule of *de minimis* would bar a recovery. Again, by any construction of this covenant in the contract it may be fairly assumed that upon an honest and modern milling of the ore the milling company was bound to return an *average* of at least seventy per cent of the pulp assay. Whether this average was to be based upon the daily or monthly output milled, or based upon the output for the entire life of the contract, we are not concerned. For it is plain that the milling company was not bound to return at least seventy per cent of the pulp assay on each particular ton of ore milled. This is apparent, for no mode or means is provided under the contract by which such figures could be obtained. Indeed, the whole history of working and milling ore is opposed to any such construction of the contract. We find no allegation that these forty-one thousand tons of ore were milled in any particular day or month or year. The pleading does not contradict the conclusion that the milling of this particular ore was scattered along at regular or irregular intervals throughout the entire life of the contract.

If this allegation of the complaint is not strengthened by the allegations of the answer, we hold it insufficient; and the allegations of the answer upon careful consideration weaken, rather than strengthen, plaintiff's pleading. While we find a direct admission in the answer that for four certain months the return to the mining company was less than seventy per cent of the pulp assay, yet we find the further allegation "and that while the average for said months was less than seventy per cent, as above specified, yet the returns from all of the ore worked during said months were not less than seventy per cent of the pulp assay; and that said average was made up in the succeeding months." It thus appears that

while the monthly returns for these four months fell below seventy per cent of the pulp assay, yet thereafter additional returns came in from the ores milled during these months, which brought the percentage within the stipulations of the contract.

For the foregoing reasons the judgment is affirmed.

Van Dyke, J., and Harrison, J., concurred.

Hearing in Bank denied.

[S. F. No. 1039. Department One.—June 14, 1899.]

THEODORE FOX, Appellant, v. JOHN W. MACKAY, et al., Respondents.

MINING CORPORATIONS—ACTION BY STOCKHOLDERS—ALLEGED FRAUD IN MILLING OF ORE—QUESTIONABLE FAITH OF PLAINTIFF.—In an action by a stockholder of a mining corporation for an accounting of ores claimed to have been fraudulently milled as the result of an alleged conspiracy between certain stockholders of the mining company, who had organized the milling company, the good faith of the plaintiff in bringing the action is open to question, where it appears that he purchased five shares of the stock, and held it but a single month, for the purpose of bringing the action, while the holders of the remaining two hundred and fifteen thousand nine hundred and ninety-five shares appear to be satisfied with the past management of the corporation, and that the plaintiff also brought five similar actions against other corporations on the same day.

ID.—FINDINGS AND EVIDENCE AGAINST FRAUD.—Findings supported by evidence showing that the contract for the milling of the ore was fair, and that the milling was honestly done, and yielded an average per cent of the pulp assay in excess of that required by the contract, though in certain months of incompleting runs the yield was less, and that none of the stockholders of the mining company who organized the milling company were directors of the former, or participated in or controlled in any manner its action in the making of the contract, are a bar to any recovery by the plaintiff.

ID.—CONCEALMENT OF INTEREST IN MILLING CONTRACT—DUTY OF STOCKHOLDERS.—The stockholders of the mining corporation, merely as such, owed no duty to inform it of their interest in the contract made with the milling company, and the concealment of such interest is not a fraud *per se* upon the mining company, if its action in making the contract was not controlled by them in any manner.

APPEAL from an order of the Superior Court of the City and County of San Francisco denying a new trial. J. M. Seawell, Judge.

The facts are stated in the opinion.

H. G. Sieberst, for Appellant.

The findings are not sustained by the evidence.

It only needed a slight showing of unfairness to set the contract aside, as being an executory contract, affecting a trust relation. (*State v. Richmond*, 26 N. H. 237, 238; *Guernsey v. Cook*, 120 Mass. 501; *Rhodes v. Forwood*, L. R., 1 App. Cas. 256; *Legard v. Hodges*, 1 Ves. J., 478; *Aberdeen R. R. v. Blakie*, 1 McQueen, 461; Morawetz on Corporations, secs. 518, 519, 525; *Forbes v. McDonald*, 54 Cal. 100; *Wardell v. Union Pac. R. R.*, 103 U. S. 651; *Oakland v. Carpentier*, 13 Cal. 540; *Fox v. Hale & Norcross Co.*, 108 Cal. 385.) The control of the stock of the corporation amounted to a control of the corporation, and a contract effected by persons having such control requires the utmost good faith. (*Rice's Appeal*, 79 Pa. St. 168; *Robinson v. Smith*, 3 Paige, 222; 24 Am. Dec. 212; *Metropolitan etc. Ry. Co. v. Manhattan Ry. Co.*, 14 Abb. N. C. 108. The ratification or acquiescence of the other stockholders could not affect the rights of the plaintiff. (*Lewin on Trusts*, 371, 372, 660-64; *Ex parte Hughes*, 6 Ves. 222; *Davoue v. Fanning*, 2 John Ch. 264; *Hoffman Steam etc. Co. v. Cumberland Coal Co.*, 16 Md. 468; 77 Am. Dec. 311; *Hazard v. Durant*, 11 R. I. 207; *Cumberland Coal Co. v. Sherman*, 30 Barb. 575-77.) Equity rule 94, applicable to the equity courts of the United States, does not apply to an action in the courts of this state, and plaintiff's status in this court cannot be assailed on account of the smallness of the plaintiff's stock, which cannot prevent a suit in this court to remedy a corporation wrong. (*Cook on Stockholders*, secs. 735, 736, 743; Civ. Code, sec. 298; *Parsons v. Joseph*, 92 Ala. 403.) Plaintiff represents the corporation. (*Beach v. Cooper*, 72 Cal. 99.)

W. E. F. Deal, and Edmund Tauszky, for Respondents.

The findings are supported by the evidence. There is no trust relation between stockholders and the corporation, or

between stockholders. (*Verplanck v. Mercantile Ins. Co.*, 1 Edw. Ch. 84-87; *Johnson v. Kirby*, 65 Cal. 482-88.) There is no legal inference or presumption that owners of a majority of stock dominated the corporation. (*Porter v. Pittsburg etc. Co.*, 120 U. S. 670; *Pullman Car Co. v. Missouri Pac. R. R. Co.*, 115 U. S. 597.) Stockholders have the right to deal with the corporation, in the same manner as strangers. (*Twin Lick Oil Co. v. Marbury*, 91 U. S. 587; 1 Spelling on Private Corporations, sec. 346; *Harts v. Brown*, 77 Ill. 226; *Merrick v. Peru Coal Co.* 61 Ill. 472; *Culbertson v. Wabash Nav. Co.*, 4 McLean, 544.) Plaintiff having bought five shares of stock for the sole purpose of bringing this suit, he is to be regarded as an interloper. (*Kingman v. Rome etc. R. R. Co.*, 30 Hun, 73; *Robson v. Dodds*, L. R. 8 Eq. Cas. 301; *Hawes v. Oakland*, 104 U. S. 450; *Moyle v. Lander*, 83 Cal. 579; *Dimpfell v. Ohio etc. Ry. Co.*, 110 U. S. 209; *Miller v. Murray*, 17 Colo. 408; *Boyd v. Sims*, 87 Tenn. 771; *Rathbone v. Gas Co.*, 31 W. Va. 798; *Latimer v. Richmond etc. R. R. Co.*, 39 S. C. 44; *Alexander v. Searcey*, 81 Ga. 536; 12 Am. St. Rep. 337; *Moore v. Silver Valley Min. Co.*, 104 N. C. 534; *Dannemeyer v. Coleman*, 11 Fed. Rep. 97.) Plaintiff's motive is a proper subject of inquiry in this case. (*McFadden v. Santa Anna etc. Ry. Co.*, 87 Cal. 464, 470; *Neal v. Neal*, 58 Cal. 288; 1 Greenleaf on Evidence, sec. 446; 2 Spelling on Private Corporations, sec. 662; *Belmont v. Erie Ry. Co.*, 52 Barb. 637; *Waterbury v. Merchants etc. Co.*, 50 Barb. 157, 168; *Robson v. Dodds*, L. R. 8 Eq. 301; *Tfooks v. Southwestern Ry. Co.*, 1 S. & G. 142; *Forrest v. Manchester etc. Ry. Co.*, 4 De Gex. F. & J. 126.)

GAROUTTE, J.—Plaintiff brings this action as a dissatisfied stockholder and on behalf of the Consolidated California & Virginia Mining Company, which corporation is made a party defendant. The defendant, the Comstock Mill and Mining Company, was never served with process and is not interested in the litigation. John W. Mackay and John P. Jones are the real parties defendant. The corporation represented in this litigation by plaintiff has two hundred and sixteen thousand shares. Plaintiff is the owner of five shares of this stock.

By the bill a conspiracy is charged against Mackay and Flood to defraud the Consolidated California & Virginia Mining Company. It is claimed that at all times prior to Flood's death he and Mackay controlled this mining corporation, and that subsequent to Flood's death Mackay alone controlled it. That upon December 23, 1885, the mining company entered into a three year's contract with J. P. Jones for the milling of its ores; that this contract was entered into by the connivance and procurement of Mackay, Flood, and Jones; that Mackay and Flood were interested with Jones in the profits of the contract, and also controlled the directors of the mining company, and that the contract was greatly to the disadvantage and loss of the mining company; and that by Jones' contract he agreed to transport the ore from the dump to the mill, and mill the same for six dollars per ton, returning to the mining company at least seventy per cent of the pulp assay. It is next alleged that upon January, 8, 1886, the Comstock Mill and Mining Company was organized by Jones, Mackay, and Flood, and that this milling contract was thereupon assigned to said milling company. It is further charged that upon December 24, 1886, this milling contract was modified and changed at the instigation of Mackay, Flood, and Jones, to the great loss of the mining company. It is further alleged that forty-one thousand tons of ore were milled, and less than seventy per cent of the pulp assay returned upon such ore. By the bill, reduced to its lowest terms, it is claimed that Mackay and Flood are the moving, controlling parties in both corporations, and by the contract of milling and the unskillful and careless manner of milling, and by violations of the contract of milling, they defrauded the mining company out of immense sums of money. After the introduction of evidence upon issue joined, findings of fact were made by the trial court. These findings of fact are strong against the allegations of the bill, and, unless overthrown, stand as a stone wall, forever barring a recovery by the plaintiff. Realizing these conditions, plaintiff has assaulted the findings as without support in the evidence. A few errors of law in the admission and rejection of evidence are relied upon by plaintiff, but we find them of such minor importance as not to demand consideration.

Defendants also urge certain grounds as fatal to plaintiff's cause of action. It is claimed that plaintiff was not a stockholder upon the books of the mining corporation at the times these various frauds are alleged to have been committed. It is said that the record discloses plaintiff to be a mere speculator and professional litigant, making this class of litigation a specialty, and that he purchased these five shares of stock of the corporation for the sole purpose of giving him a status as a party plaintiff, and that, therefore, he has come into a court of equity with bad motives. It is urged that plaintiff made no demand upon the corporation to bring the action. Laches is also relied upon, and likewise ratification by the stockholders is claimed. Although some of these defenses present interesting legal propositions, we pass them by with little discussion in view of the conclusion just arrived at after an examination of the evidence and findings of fact.

The record largely justifies the claim of defendants as to the somewhat equivocal position plaintiff occupies in this case. It is not entirely plain that he is one of those dissatisfied stockholders whom the law had in mind when it authorized such a one to inaugurate this character of litigation. Plaintiff's good faith in bringing the action is to some extent an open question. It is not conclusively shown that the best interests of the corporation were the moving factors in his mind in prosecuting this suit. These statements are justified when we consider that plaintiff as the holder of five shares of stock of the corporation stands alone; for, as far as we may be allowed to see, the holders of the remaining two hundred and fifteen thousand nine hundred and ninety-five shares are entirely satisfied with the corporation's past business management. They are fairly justified, in view of the fact that plaintiff held this particular five shares of stock but for a single month, and purchased them for the purpose of giving him a standing as plaintiff in this action. And also in view of the further fact that he brought five other actions of the same character against five other mining corporations upon the day this complaint was filed.

The findings are full and complete and cover every substantial allegation of the bill. We see no good purpose to be subserved by setting forth in this opinion a detailed recital

of the evidence which tends to support these findings, but might well content ourselves in saying that after a careful reading of the record we are satisfied that the trial judge was justified, under the evidence, in finding the facts as they are set out. If the case were to be reversed by reason of the insufficiency of the evidence, then, for the guidance of the trial court upon a second trial, we would point out in detail where the weak spots are found. But the rule may well be otherwise when the court deems the evidence sufficient. Yet in view of the importance of the litigation, and the labor involved in the trial and the preparation of the record upon appeal, a few of the most important contentions of plaintiff will be noticed.

As to the milling contract of December, 1885, entered into with the mining company by Jones, the court has found that it was a fair contract for the mining company, and was honestly performed, and there is an abundance of evidence to support that finding. Indeed, there is hardly a substantial conflict of evidence upon the issue. If the contract made was a fair contract, and honestly performed, it would seem to be immaterial as to the part Mackay, Jones, and Flood took in making it. But waving the question as to what a court of equity might do with them if they had participated in the making of the contract, we find any participation absolutely denied by the evidence of both Mackay and Jones. Mr. Mackay testifies: "That at no time since November 17, 1883, either individually or with others, did he own or control a majority of the stock of the defendant. That he has not since that time taken any part in any election of any board of directors of the company, or attempted to control any action of the board of directors, or any member thereof. That he had nothing to do with their election, or influencing the stockholders or anybody else as to who should be elected, and never asked a shareholder for a proxy. I never asked or requested Mr. Havens, or anybody else connected with the company, to get proxies to be used at any stockholders' meeting. I have attended no meeting of the board of directors of the company since November 17, 1883." Mr. Jones testified: "I have taken no part whatever in the election of any board of directors of the company. I never spoke to any of

the directors about their becoming directors, nor have any of them ever spoke to me; have never done anything to secure the control of the board of directors of either of these companies; had nothing to do with it; never took any interest in it; could not have told you who they were. I have not procured, either directly or indirectly, in any manner, shape or form, the election of any director of the company, or made any attempt to do such a thing; never made any attempt in any manner to control the action of any board of directors of either of the companies that I have mentioned. I have never controlled or sought to control the affairs of the mining company, and I have never taken any part in its affairs at all." It is sufficient to say that the finding of the trial court was directly in line with this testimony.

The transactions evidenced by this litigation cover a period of seventy-one months. During that time there were four months when the milling company failed to return to the mining company seventy per cent of the pulp assay. But these returns were not greatly below seventy per cent, and when we consider that many other months intervened between each of the said four months, the failure at those times to return seventy per cent becomes immaterial; for it is disclosed by both evidence and findings that the actual per cent of the return by the milling company cannot be determined at the end of a single month, unless the run terminates at that time. This is accounted for by the reason of the clean-up made at the end of the run which raises the average of the return for every month during the run. Such was the fact in this case, as is disclosed by both evidence and finding. During this period of seventy-one months there were four months in which the returns were over ninety per cent of the pulp assay, and forty-two months in which those returns were between eighty and ninety per cent. Under this showing there is nothing whatever to indicate fraud in the milling of the ore, and nothing whatever to furnish any reason why a stockholder of the mining company should be dissatisfied.

The milling contract of December, 1885, was modified by the parties in December, 1886. It appears that during the year 1885 large bodies of richer ore were found, and for this

reason and others—as, for example, the increase in the price and quantity of quicksilver required to mill the richer ores—the contract was modified, whereby the milling company received compensation for transportation and milling based upon a scale per ton according to the richness of the ore. This contract is declared by the trial court to be a fair one, and to have been honestly and faithfully carried out. The evidence fully supports the finding. Even conceding that the evidence discloses a few instances where the milling company charged seven dollars per ton when they should have charged but six dollars, still there is nothing in such fact alone to indicate fraud. Indeed, it would seem that if mistakes of this character did occur, the balance of the account resulting therefrom stands in favor of the mining company.

In view of the fact that neither Mackay nor Flood was ever a director of the mining company, and in view of the further fact that the findings supported by the evidence declare that neither collectively nor individually did they control the directors of the mining company, it would seem that many of the matters raised upon the motion for a new trial and discussed in appellant's brief become immaterial. Indeed these findings supported by the evidence would seem to almost undermine plaintiff's entire case. Certainly, upon such a state of facts the discussion of various matters of fact and law raised in appellant's brief becomes unnecessary. Plaintiff insists that the intentional concealment by Mackay and Flood of their interest in the contract of the milling company should weigh strongly against them. Yet, conceding this claim of concealment to be true, still these men were not directors of the mining corporation, nor did they control its directors. And as mere stockholders they owed it no duty. Again, for the same reason, the ruling of the court relating to the admissibility of Holden's evidence as an expert could not possibly prejudice plaintiff's case. In fact, it would seem that some of the questions we have already discussed and declared against appellant's contention could well have been disposed of upon this ground. After a careful examination of the record we see nothing which demands a retrial of the case.

For the foregoing reasons the order is affirmed.

Van Dyke, J., and Harrison, J., concurred.

Hearing in Bank denied.

[S. F. No. 1059. Department One.—June 14, 1899.]

EMMA J. McKAY, Respondent, v. ANGUS McKAY, Appellant.

DIVORCE—MAINTENANCE OF CHILDREN—OMISSION IN DECREE—SUBSEQUENT ORDER—JURISDICTION.—In an action for divorce, where the custody of the children was awarded to the wife without any provision in the decree for their maintenance, the court, though having no jurisdiction to act subsequently under section 139 of the Civil Code, has jurisdiction, under section 138 of that code, to give a subsequent direction "for the custody, care, and education of the children," and to provide for the expenses reasonably to be incurred for their "care and education."

ID.—CONSTRUCTION OF CODE—PROSPECTIVE ACTION.—The provisions of section 138 of the Civil Code are in their nature prospective; and the use of the term "direction" implies that the action of the court is to be limited to the "care and education" which the children are subsequently to receive under its direction.

ID.—LIMITED POWER OF COURT—BENEFIT OF CHILDREN—REIMBURSEMENT OF PAST EXPENSES.—The jurisdiction retained by the court under section 138 of the Civil Code is to be exercised only in behalf of the children; and if they have been already sufficiently cared for by the voluntary act of the mother, or of other persons, the court is not empowered, in an order made for the first time after judgment, to compel the father to reimburse them for these past expenses.

ID.—VOLUNTARY EXPENSES BY STEPFATHER—PRESUMPTION—REIMBURSEMENT NOT REQUIRED.—Where it appears that subsequently to the decree and to the remarriage of the divorced wife, the children were received into the family of the stepfather, and the expenses of their care and education were voluntarily incurred by him, it must be presumed, under section 209 of the Civil Code, that he supported them as a parent, and they are not liable to him for their support. The father is not bound to reimburse the stepfather therefor; and the court cannot order such reimbursement under section 138 of the Civil Code.

APPEAL from an order of the Superior Court of the City and County of San Francisco, directing the payment of moneys for the support and education of minor children. John Hunt, Judge.

The facts are stated in the opinion of the court.

W. S. Goodfellow, for Appellant.

The court had no jurisdiction to make the order appealed from. (*Howell v. Howell*, 104 Cal. 45; 43 Am. St. Rep. 70.) Section 138 of the Civil Code by its title relates to the custody of the children, and not to their maintenance, which is provided for in sections 137 and 139. Moneys awarded to the wife for the support of the children are the property of the wife, and not of the children. (*Brenot v. Brenot*, 102 Cal. 294, 296; *Simpson v. Simpson*, 80 Cal. 237; *Schammel v. Schammel*, 105 Cal. 258; *Swiney v. Swiney*, 107 Mich. 459.) The husband and father, by the existing law of this state, is relieved from obligation to support the wife and children where the custody is awarded to the wife, without provision for the support of wife or children in the decree. (Civ. Code, secs. 196, 208; *Ex parte Miller*, 109 Cal. 648, 649; *Howell v. Howell*, *supra*; *Rich v. Rich*, 34 N. Y. Supp. 854; *Gould v. Gould*, 18 Misc. Rep. 334; 42 N. Y. Supp. 143.) *Wilson v. Wilson*, 45 Cal. 401, is not applicable under the code. The stepfather, having received the children into his family and voluntarily supported them as a parent, has no claim to be reimbursed for their support. (Civ. Code, sec. 209; 2 Kent's Commentaries, 192; *Johnson v. Onsted*, 74 Mich. 437; *Foss v. Hartwell*, 168 Mass. 66; 60 Am. St. Rep. 366.)

William H. Chapman, and B. B. Robinson, for Respondent.

The order was proper, under section 138 of the Civil Code; and under the power of the court to do complete justice. (*Wilson v. Wilson*, 45 Cal. 401; *Ex parte Gordon*, 95 Cal. 375; *Schammel v. Schammel*, 105 Cal. 261; *Plaster v. Plaster*, 47 Ill. 290; *Holt v. Holt*, 42 Ark. 495; *McNess v. McNess*, 97 Ky. 152; *Erkenbrach v. Erkenbrach*, 96 N. Y. 456.)

HARRISON, J.—A decree of divorce was rendered May 29, 1884, between the parties hereto upon the application of the plaintiff and for the offense of the defendant, and by the decree the care, custody, and control of the two minor children of the marriage, then aged five and three years respectively, was awarded to the plaintiff. No provision was made in the decree for the maintenance of the children or for

the support of the wife. In 1886 the plaintiff became the wife of R. S. Polastri, and thereupon her husband took the children into his family, and subsequently brought them up and supported them as members thereof. March 2, 1897, the plaintiff filed in said cause a petition to the superior court for an order requiring the defendant to pay certain moneys for the past support of each of said children, and also for their future maintenance and education. After a hearing thereon, the court made an order requiring the defendant to "pay to the plaintiff the sum of three thousand seven hundred and fifty dollars for the past care, maintenance, education, and support of said minor children, and also the further sum of one hundred dollars a month until the further order of the court for the future support, education, and maintenance of said minor children." From this order the defendant has appealed.

1. Whether the court was authorized to modify the judgment entered in 1884 by adding thereto the provision requiring the defendant to provide for the care, custody, and education of the children is to be determined by a construction of the provisions of the code upon this subject. In jurisdictions where procedure is not regulated by statute, but is according to the rules and practice of the court, such authority is maintained upon the ground that when chancery has once acquired jurisdiction over the subject matter it will continue to exercise that jurisdiction so long and as often as occasion shall require for the purpose of making its decree effective. (*Holt v. Holt*, 42 Ark. 495; *Plaster v. Plaster*, 47 Ill. 290.) But, where the procedure is regulated by statute, courts have not this inherent power, and their jurisdiction over the subject matter of the action, as well as over the parties, terminates with the entry of final judgment therein, except for the purpose of enforcing the judgment and carrying out its provisions, or for correcting any mistakes in the record upon proper application therefor. The judgment becomes final upon its entry, not only as to the matters actually determined, but also as to every other matter which the parties might have litigated in the cause and have had decided (*Kamp v. Kamp*, 59 N. Y. 212.) In a majority of the states, however, express authority is given to the court by statute to make changes in its judgments from time to time as circumstances may justify. (See *Buckminster v. Buckminster*, 38 Vt. 248; 88 Am. Dec. 652; *Campbell v. Campbell*, 37 Wis. 203.)

But the changes which may thus be made are limited to the cases and conditions expressed in the statute by which they are authorized. In *Erkenbrach v. Erkenbrach*, 96 N. Y. 456, after holding that this authority in that state is purely statutory, the court said: "The statute carefully defines the various causes for which a divorce may be allowed, the relief which may be granted in such actions during the pendency thereof, and by its final decree, and the cases in which the courts may make further orders. The legislature has assumed to legislate upon the subject, and has defined the purposes for which an order may be made by the courts after final decree. By expressly authorizing an order to be made after judgment providing only for the 'care, custody, and education of the children of the marriage,' it has impliedly prohibited such an order for any other cause." To the same effect is the provision of section 4 of the Civil Code of this state, which declares: "The code establishes the law of this state respecting the subjects to which it relates." The codes, however, are to be construed as a single statute, and upon this subject section 577 of the Code of Civil Procedure must be read in connection with sections 138 and 139 of the Civil Code. These sections are as follows:

"Sec. 138. In an action for divorce the court may before or after judgment give such direction for the custody, care, and education of the children of the marriage as may seem necessary or proper, and may at any time vacate or modify the same."

"Sec. 139. Where a divorce is granted for an offense of the husband, the court may compel him to provide for the maintenance of the children of the marriage, and to make such suitable allowance to the wife for her support during her life, or for a shorter period, as the court may deem just, having regard to the circumstances of the parties respectively; and the court may from time to time modify its orders in these respects."

In *Howell v. Howell*, 104 Cal. 45, 43 Am. St. Rep. 70, it was held that when the original decree of divorce made no

provision for an allowance to the wife for her support, the court had no jurisdiction thereafter to make an order compelling the husband to pay alimony to her; that, if no order for its payment was included in the decree of divorce, there was nothing to "modify," and that such subsequent order was void. Under the reasoning in that case, it must be held that by the failure to make provision in the decree for the maintenance of the children, the court had no authority under this section to make the order appealed from. The decision in *Wilson v. Wilson*, 45 Cal. 399; cited by the respondent, was made prior to the adoption of the codes, and under a statute which expressly authorized the court to make an order subsequent to the judgment for the maintenance of the children of the marriage (Stats. 1851, sec. 7, p. 187), but cannot be regarded as an authority under, different provisions of the code. Whether the court has power under section 138 of the Civil Code to make such subsequent order for the "care, custody, and education" of the children, was not involved in the case of *Howell v. Howell*, *supra*, and was expressly stated in the opinion therein not to have been considered. The Revised Statutes of New York (2 N. Y. Rev. Stats., sec. 59, p. 148) contain provisions similar to those of section 138 of the Civil Code, and in *Erkenbrach v. Erkenbrach*, *supra*, it was held by the court of appeals of that state, in construing this section of the statute, that, as it authorized the court to make an order after judgment for the "care, custody, and education" of the children of the marriage, it must be assumed that provision for the expenses reasonably to be incurred for the accomplishment of these objects was within the intention of the legislature in framing the section. This ruling was followed in *McKay v. Superior Court*, 120 Cal. 143, wherein it was determined that under the provision of section 138 of the Civil Code the superior court had jurisdiction to entertain the application of the plaintiff and to make an order thereon.

2. *McKay v. Superior Court*, *supra*, was an original application to this court for a writ of review, and the only question presented for consideration was the jurisdiction or power of the superior court to make the order; but, whether the facts before the court justified it in the exercise of this power,

or whether the order was broader in its scope than was justified by the evidence presented therefor, was not involved or presented for consideration. These questions are presented upon the present appeal, and upon an examination of the evidence before the superior court we are of the opinion that it was not authorized to include in its order any direction for the payment by the defendant of the expenses incurred prior to making the application. It clearly appears from the bill of exceptions that Mr. Polastri, immediately upon his marriage with the plaintiff took the children into his family, and that since that time has cared for them and paid all the expenses of their support and education; and the plaintiff testified that, as far as any compensation for past support is concerned, it would be to recompense Mr. Polastri for moneys that he has spent upon these children. Section 209 of the Civil Code provides: "The husband is not bound to maintain his wife's children by a former husband; but, if he receives them into his family and supports them, it is presumed that he does so as a parent; and where such is the case they are not liable to him for their support, nor he to them for their services." The plaintiff does not claim to have expended any money in the support or education of the children, other than that expended by Mr. Polastri, and, under the provisions of this section, he could have no claim upon the defendant for his support of the children. The provisions of section 138 cannot be made a substitute for an action, or give to him the right to assert through the plaintiff a claim which he could not himself make. (*Johnson v. Onsted*, 74 Mich. 437.)

The provisions of section 138 are in their nature prospective, and the use of the term "direction" instead of "payment" implies that the action of the court is to be limited to the "care, custody, and education" which the children are subsequently to receive under its directions. If the original decree had contained a provision upon this subject, such provision would have been the measure of the rights and liabilities of the parties to the suit until the courts should make some modification thereof; and until the court had given some direction for the subsequent care and education of the children, there could be no liability on the part of the defendant for the expenses that might be incurred thereunder. Manifestly, the court could give no direction for the care and education of the children prior to its order, and, in the absence of such direction, no liability would exist against the defendant, and no obligation could be created against him. In *Kendall v. Kendall*, 5 Kan. App. 688, the minor

children had been awarded to the mother, but no provision was made in the decree for their support. Subsequently, upon the application of the mother, the court directed the payment of a certain sum by the father for their support, and that this payment should commence at the date of the original decree. Upon appeal this portion of the order was reversed, and the court directed that the payments should commence at the date of the modification of the order, and not from the date of the original decree. In *Washburn v. Catlin*, 97 N. Y. 623, the general term had made an order requiring the defendant to pay the expenses incurred during the previous nine years, but the court of appeals modified this order by restricting such payment to the expenses incurred subsequent to filing the petition.

The question of the father's liability for the care and support of his children after a decree of divorce, in which their custody has been awarded to the mother, has been frequently presented in actions brought therefor by strangers, or by the mother, and courts have almost invariably held that an action against him to enforce such liability could not be maintained. (*Finch v. Finch*, 22 Conn. 411; *Ramsey v. Ramsey*, 121 Ind. 215; *Burritt v. Burritt*, 29 Barb. 124; *Harris v. Harris*, 5 Kan. 46; *Hancock v. Merrick*, 10 Cush. 41; *Brown v. Smith*, 19 R. I. 319; *Hall v. Green*, 87 Me. 122; 47 Am. St. Rep. 311.) A contrary holding was made in *Pretzinger v. Pretzinger*, 45 Ohio, 452, 4 Am. St. Rep. 542, but as was said in *Brown v. Smith*, *supra*, this case is opposed to the preponderance of American authorities upon this subject; and in a subsequent case in the same state (*Fulton v. Fulton*, 52 Ohio, 229, 49 Am. St. Rep. 720) the ruling therein was materially modified. So far as the right of the wife to recover for past expenses incurred by her is involved, the principle is the same whether the application is made in an independent action or through a motion in the original case. The jurisdiction which the court retains in the original case, either by express reservation in its decree, or which it has by authority of statute, to modify its judgment with reference to the custody and education of the children, or to make a new order in reference thereto, is not for the purpose

of reimbursing her for any expenditures she may have voluntarily made in that behalf, but to provide for such expenses as may be subsequently incurred by reason of the direction that may be given regarding such care and education. The children are not parties to the litigation for the divorce, and the jurisdiction thus retained, or which the court is authorized to exercise, is to be exercised in their behalf; but, if they have already been sufficiently cared for by the voluntary act of the mother, or of strangers, the court is not empowered to compel the father to reimburse these persons for such expenses. (See *Loveren v. Loveren*, 100 Cal. 493; *Lacey v. Lacey*, 108 Cal. 45.) Section 208 of the Civil Code declares that: "A parent is not bound to compensate the other parent or a relative for the voluntary support of his child, without an agreement for compensation."

The order is reversed, and the superior court is directed to make such order in the premises as will be consistent with the views herein expressed.

Garoutte, J., and Van Dyke, J., concurred.

Hearing in Bank denied.

[L. A. No. 521. Department One.—June 15, 1899.]

H. J. ALLISON, Appellant, v. BOARD OF EDUCATION,
et cetera, et al., Respondents.

BOARD OF EDUCATION—EMPLOYMENT OF JANITOR—PREFERENCE OF EX-UNION SOLDIERS—MANDAMUS.—An ex-Union soldier who was employed for one year as janitor by the board of education of a school district, and who, after the expiration of his term of employment, was superseded by another appointee, not preferred under the act of March 31, 1891, providing for the preference of honorably discharged ex-Union soldiers, sailors, and marines of the war of the Rebellion, in appointments for public office, cannot maintain a proceeding in mandate to compel a preference of himself for the appointment without a showing that he was the only man coming under the provisions of the act who was desirous of the appointment.

APPEAL from a judgment of the Superior Court of San Bernardino County. Frank F. Oster, Judge.

The facts are stated in the opinion of the court.

Rolfe & Rolfe, for Appellant.

Mandamus is the proper remedy to enforce the right of preference given by the statute. (*Sullivan v. Gilroy*, 55 Hun, 285.)

James Hutchings, T. C. Chapman, and J. W. Stephenson, for Respondents.

It not appearing that there are not others equally entitled to the office, and equally desirous of having it, plaintiff does not show any right to the office, or any exclusion from an office to which he is entitled; and he cannot maintain a *mandamus* proceeding. (Code Civ. Proc., sec. 1085; *State v. Commissioners of Wayne Co.*, 57 Ohio St. 86.)

GAROUTTE, J.—This is a proceeding in mandate to compel the board of education of the city of San Bernardino school district to prefer the plaintiff for appointment and employment as a janitor of the high school building of said city, and to retain and continue him as such, under an act of the legislature, approved March 31, 1891, he being an honorably discharged ex-Union soldier of the war of the Rebellion. This act is entitled, "An act to provide for, insure and maintain preference in the appointment, employment and retention in public service and public works of the state of California, of honorably discharged ex-Union soldiers, sailors, and marines of the war of the Rebellion." The petitioner was employed for the period of one year as janitor, and a few days prior to the expiration of the term was discharged and another party appointed to the place. After the expiration of the year he began this proceeding. A demurrer was sustained to the petition, and this appeal was taken from the judgment entered thereon.

Respondents advance many reasons why the action of the trial court should be sustained. We will notice but a single one. The life of petitioner's contract with the board of education having expired before this proceeding was inaugurated, the purpose of the writ can only be to compel his appointment to the position by the board of education. But it ap-

pears that no vacancy exists in the position, and, therefore, the mandate sought must not only order an appointment of petitioner, but must first oust the present incumbent, and thereby create a vacancy. Even assuming that the scope of the writ of mandate may be so broad, still the showing made by the petition is not sufficient. If only a man with the qualifications of petitioner is entitled to the place, and the party filling the place has not those qualifications, still these facts alone do not show a case where petitioner is entitled to the writ. If a man filling the demands set forth in the act of the legislature has the preference, then this petitioner does not show but that there are hundreds of men possessing the qualifications that he possesses who are ready and willing and anxious to be employed as janitor by this board of education. If there be other ex-Union soldiers equally qualified with petitioner, he has no absolute right to the place and the board cannot be compelled by mandate to appoint him. In other words, he would only be entitled to the writ upon a showing made that he was the only man coming within the provisions of the act who was desirous of the appointment. The petition before us entirely fails to make such a showing.

For the foregoing reasons the judgment is affirmed.

Harrison, J., and Van Dyke, J., concurred.

[Sac. No. 539. Department One.—June 16, 1899.]

S. R. JOHNSON, Appellant, v. CHARLES WESLEY REED, et al., Defendants. MAX BROOKS, Respondent.

ACTION TO VACATE FORECLOSURE AND DEED—MOTION FOR NEW TRIAL—PRESUMPTION OF PENDENCY.—In an action to vacate a decree of foreclosure, and a deed executed thereunder, and to be allowed to redeem, where the complaint shows that a motion for a new trial was made in the original action, in the absence of any averment to the contrary, it will be presumed that the motion is still pending and undetermined.

ID.—ABANDONMENT OF MOTION BY CODEFENDANT.—An averment that one of the codefendants in the foreclosure suit had changed his attorneys and abandoned the motion, is insufficient to show that the plaintiff here was precluded from prosecuting his own motion, or from appealing from the judgment in the original action.

ID.—INDEPENDENT ACTION—GROUNDS AVAILABLE IN ORIGINAL ACTION.—The plaintiff in an independent action to vacate a judgment ren-

dered in another action cannot avail himself of any grounds which were available to him in the original action, and which he has sought to have reviewed by motion for a new trial therein, and might have had reviewed upon appeal.

ID.—INSUFFICIENT COMPLAINT—PREMATURE FORECLOSURE—FRAUD—ADJUDICATION.—‘A complaint in an action to set aside a foreclosure decree and sale, which averred that one of the defendants to such action had fraudulently induced the premature commencement of the foreclosure suit, that he might obtain title under the sale, and that the answer therein showed that the time to commence the action had been extended, and that judgment was rendered for the plaintiff, shows on its face that the court must have found and adjudged that the action was not premature, and is insufficient to show any fraud, or any ground for relief.

APPEAL from a judgment of the Superior Court of Butte County. John C. Gray, Judge.

The facts are stated in the opinion of the court.

George H. Maxwell, and R. M. F. Soto, for Appellant.

L. L. Solomons, for Respondent.

HARRISON, J.—It is alleged in the complaint herein that in an action brought to foreclose a mortgage executed by the plaintiff to the defendant Brooks, the defendants filed an answer setting up as a defense that the action was prematurely brought by reason of the fact that the time for the payment of the note secured by the mortgage had been extended to a date subsequent to the commencement of the action; that the cause was tried and judgment rendered in favor of the plaintiff therein; that thereafter the plaintiff herein filed and served a notice of his intention to move for a new trial, and that a bill of exceptions based upon said notice had been settled, allowed and filed in said action, and that an affidavit to be used on said motion had also been filed; that under said judgment the property described in the mortgage had been sold to the mortgagee and a deed therefor executed to him; that the proceeds of said sale being insufficient to satisfy the judgment, a judgment for the deficiency had been docketed against the plaintiff herein, and that an execution had been issued upon said deficiency judgment, and certain personal property sold by virtue thereof to one of the defendants herein. The complaint further alleges that prior to the commencement of said action the defendant, Charles W. Reed, induced the mortgagee to violate his agreement for the

extension of payment and to commence the action for foreclosure before the said period of extension had expired, and agree with him that the said action should be prosecuted to final judgment and a sale thereunder, and that the property should be thereafter sold and transferred to him, the said Reed; that the mortgaged property was of much greater value than the amount of the mortgage debt; but that it was also agreed between them that upon the sale under the judgment a deficiency should be left, and that an execution should be issued upon said deficiency judgment, and certain personal property of the plaintiff herein sold thereunder; that the said agreement was carried into effect, and that all of the proceedings were had with the fraudulent purpose and design of said Reed to defraud the plaintiff of his interest in the mortgaged property. Plaintiff therefore asks a judgment vacating the judgment of foreclosure and canceling and annulling the deed issued under the sale upon said judgment, and allowing him to redeem the property, and setting aside the sale of the personal property and restoring him to the possession thereof. The defendant Brooks, who appears to be the only person served with the complaint, demurred thereto, and his demurrer having been sustained judgment was entered in his favor, from which the plaintiff has appealed.

1. It is not alleged in the complaint whether the motion for a new trial in the original action has been determined or not. In the absence of any averment upon the subject it must be assumed that the motion is still pending and undetermined. The fact, as averred in the complaint, that one of the defendants therein had changed its attorneys, and that such attorneys had abandoned all the rights of that defendant upon the motion for a new trial, did not preclude the plaintiff herein from prosecuting his own motion therefor or from appealing from the judgment therein. As all the facts upon which the plaintiff claims that the judgment of the court was unauthorized were set up in his answer to the foreclosure suit, it must be assumed that the court found that they were unsustained by the evidence. If such was not the fact, or if the judgment therein was rendered by reason of any error or irregularity in the procedure, such

error must be cured through the proceedings for a new trial. If, however, it be the fact that that court has denied his motion for a new trial, the plaintiff must seek a review of that order by an appeal therefrom. The correctness of a judgment cannot be reviewed in an independent action upon grounds which were available to the litigant in the original action, and upon which he has sought to have it reviewed by a motion therein.

2. As the court by giving judgment for the plaintiff in the foreclosure suit must have found that the action was not prematurely brought, it is evident that the mortgagee in bringing the action after the maturity of the obligation was in the exercise of his legal rights, and that the action of Mr. Reed in inducing him to bring the suit was not with any fraudulent purpose, however much he may have sought to profit thereby. It may be added that the allegations in the complaint fail to establish any fraudulent purpose or conduct on the part of Mr. Reed. No fact is alleged which either by itself or in connection with the other portions of the complaint constitute a sufficient averment of fraud.

The appeal herein is without merit, and the judgment is affirmed.

Garoutte, J., and Van Dyke, J., concurred.

[Sac. No. 603. Department Two.—June 16, 1899.]

SAN JOAQUIN VALLEY BANK, Respondent, v. EMILY DODGE et al., Appellants.

WAY OF NECESSITY—TITLE UNDER FORECLOSURE OF MORTGAGE—WAY OVER HOMESTEAD OF MORTGAGOR.—A way of necessity arises when one grants a parcel of land surrounded by his other lands, or where the grantee has no access to it from the public road except over the land of the grantee, or that of a stranger; and this rule applies to a grantee who takes title under foreclosure of a mortgage to land so situated that there is no access thereto excepting across a homestead of the mortgagor, which was included in the mortgage, but was not sold thereunder.

ID.—SUFFICIENCY OF COMPLAINT—DESCRIPTION OF WAY—STIPULATION—APPEAL.—A complaint to establish a way of necessity, which sets forth the facts as to the ownership by the different parties, and shows the right to a way of necessity, is not fatally defective for not describing the way, the location of which the defendant had the right to dictate; and where the case was tried on the

theory that the complaint was sufficient, and the parties stipulated as to the proper description of the way, if it should be adjudged that one exists, the complaint will be held sufficient upon appeal.

PLEADING—AMENDMENTS—DISCRETION—PRESUMPTION.—Amendments to pleadings are within the discretion of the court below; and it is presumed that such discretion will be exercised in furtherance of justice, and with a view of disposing of cases upon their merits. The appellate court will not interfere, unless such discretion is abused.

ID.—AMENDMENT TO ANSWER—STATUTE OF LIMITATIONS—SUBMISSION OF CAUSE.—It is not an abuse of discretion to refuse to allow an amendment to the answer, so as to plead the statute of limitations, where the application therefor was not made until after the case was tried and submitted.

APPEAL from a judgment of the Superior Court of San Joaquin County and from an order denying a new trial. Edward I. Jones, Judge.

The facts are stated in the opinion.

Louttit & Middlecoff, for Appellants.

The homestead, having been released from the lien of the mortgage, cannot be subjected to execution, or to any burden imposed by the mortgagee or his successors in interest, and cannot be taken upon execution, in whole or in part, in an action for a way. (Civ. Code, secs. 1240, 1241; *Fitzell v. Leaky*, 72 Cal. 477; *Beaton v. Reid*, 111 Cal. 484.) The interest of the wife in the homestead cannot be subjected to any way, growing out of any act on the part of the husband. (Civ. Code, sec. 1242; *Barber v. Babel*, 36 Cal. 11; *Porter v. Bucher*, 98 Cal. 454; *San Francisco v. Grote*, 120 Cal. 59; 65 Am. St. Rep. 155.) One tenant in common cannot create a way over common property. (1 Washburn on Easements, 222; *Crippen v. Morss*, 49 N. Y. 63; *Palmer v. Palmer*, 150 N. Y. 139; 55 Am. St. Rep. 653.) There can be but one way of necessity, and this way must be over the lands of the last grantor granting to the person claiming the way of necessity. (1 Washburn on Easements, 40, 41, 218.) The way should have gone over the lands of parcel 3, on foreclosure, and not over the homestead lands. (*Currier v. Howes*, 103 Cal. 431.) The creditor who creates the necessity for the way must bear the burden of giving the way. (*Pettingill v.*

Porter, 8 Allen, 1; 85 Am. Dec. 671; *Russell v. Jackson*, 2 Pick. 573; *Lankin v. Terwilliger*, 22 Or. 97.) The homestead, having been occupied by husband and wife for five years, no way of necessity could be established over it. (Code Civ. Proc., sec. 322.) The facts showing this appeared in the answer, and this was a sufficient plea. (*Montgomery v. Locke*, 72 Cal. 75; *Manning v. Dallas*, 73 Cal. 420.) The refusal of the court to permit an amendment to plead the statute of limitations was an abuse of discretion. An easement is subject to the statute of limitations. (*Yeager v. Woodruff* (Utah), 53 Pac. Rep. 1045.) The statute of limitations is no longer regarded with disfavor by the courts. (1 Ency. Pl. & Pr. 500; *Gilchrist v. Gilchrist*, 44 How. Pr. 317; *McQueen v. Babcock*, 3 Keyes, 428; *White v. Turner*, 2 Gratt. 502; *Hibernia etc. Soc. v. Jones*, 89 Cal. 507; 25 Am. St. Rep. 145.)

Minor & Ashley, for Respondent.

The right of way of necessity is recognized in this state; and the principles established by the decisions in this state sustain the judgment in this case. (Civ. Code, sec. 801, subd. 4, sec. 1104; *Kripp v. Curtis*, 71 Cal. 63; *Taylor v. Warneky*, 55 Cal. 350; *Blum v. Weston*, 102 Cal. 362; 41 Am. St. Rep. 188, and cases there cited.)

COOPER, C.—Action to have plaintiff adjudged owner of a right of way of necessity over lands of defendant Emily Dodge. Judgment for plaintiff. Motion for a new trial, which was denied. Defendant appeals from the judgment and order. The facts, briefly stated, are as follows: On December 3, 1881, one Dodge was the owner of a tract of land which he mortgaged to one Hewlett. In the year 1885 Dodge recorded a declaration of homestead on a portion of the land so mortgaged, which homestead was afterward duly set apart by the superior court to said Dodge in insolvency proceedings. The family of Dodge consisted of himself and wife, Emily Dodge, one of the defendants in this case.

On July 21, 1886, Hewlett commenced an action to foreclose his said mortgage, making Dodge and his wife Emily defendants. On October 6, 1886, the court decreed that Hewlett recover judgment against said Dodge, the mortgagor, for fifteen thousand seven hundred and eight dollars and eighty cents, and that the said judgment was a lien

upon five separate parcels of land, which are described and referred to in this action as lots 1, 2, 3, 4, and 5. Lot 5 was the homestead so selected. The decree directed the sale of the land in five separate parcels in the order of their numbering and that if sufficient money should be raised from the sale of the parcels numbered 1, 2, 3, and 4, that parcel number 5, being the homestead, should not be sold. On November 4, 1886, the property described in said decree as lots 1, 2, 3, and 4 was sold to different purchasers and sufficient money realized from the sale to pay the judgment, leaving the homestead unsold and free from the mortgage lien. At the said sale one Ladd became the purchaser of lot 4, and the plaintiff thereafter, by mesne conveyances, prior to the commencement of this action, became the owner of said lot 4. The land mortgaged as a whole was bounded on the east by a public highway known as the Waterloo road, and the homestead is bounded on the east by said public highway. Lot numbered 4 is bounded easterly and southerly by the Calaveras river, westerly by lands of strangers, and on the north by lot 3 and the homestead lot. The homestead lot lies east of lot 3 and thus forms the boundary of a portion of the northerly line of lot 4. When lot 4 was sold at said foreclosure sale, at all times since, and now, said highway known as the Waterloo road could not be reached except by crossing over the homestead without crossing the lands of strangers, and plaintiff is unable to use and enjoy its said property without a way to it from said public highway. Dodge died in July, 1893, leaving the defendant, Emily Dodge, the sole owner of the homestead. The principal question in this case is whether or not, by the sale of lot 4 under the decree of court, the homestead was burdened with the way of necessity from said lot 4 to the highway. A way of necessity arises when one grants a parcel of land surrounded by his other land, or where the grantee has no access to it except over the other land of the grantor or as an alternative by passing over the land of a stranger. In such cases the grantor impliedly grants a right of way over his land as incident to the purchaser's occupation and the enjoyment of the premises granted. The general rule is not questioned, and if Dodge, the mortgagor, instead of the

sheriff had sold lot 4, and if the homestead had not been filed, the rule would, beyond question, apply to him. It is claimed that the rule does not apply to the defendant, Emily Dodge, in this case for two reasons: 1. Because the premises were sold by the sheriff under order of the court; and 2. Because of the homestead having been filed prior to the decree and sale. One of the earliest cases, decided more than one hundred years ago, is *Howton v. Frearson*, 8 Term Rep. 50. One S. Dalby, a widow, was seised for her life of certain lands in the liberty of Ockbrook, which estate was limited in remainder to her son, J. J. Dalby, in tail. The mother died and her said son became entitled to the lands. By the will of the son certain trustees were appointed for the sale of the lands, and after his death the said trustees sold to the plaintiff in said case three parcels of land, to wit, the "allotment," "Draycott field," and "Carr close," and to defendant the "upper meadow." Soon after defendants purchased, the owners of other portions of lands purchased at the trustees' sale closed up the way over their lands leading to defendants' lands, the "upper meadow." The case was argued at length in Trinity term as to whether or not the rule applied to a grant made by trustees. Lord Kenyon entertained great doubt upon the question and ordered that the case might be argued again at the next term. Upon the calling of court and before the case was reargued the learned chief justice said: "Upon further consideration I find it impossible to distinguish this from the general case where a man grants a close surrounded by his own land (in which case the grantee has a way to it of necessity over the land of the grantor) merely on the ground that the plaintiff conveyed to the defendant in the character of trustee, for it cannot be intended that he meant to make a void grant. There being no other way to the defendant's close but over the land of one of the persons who granted to him, he was entitled to such a way of necessity upon the authority of all the cases, upon the principle that every deed must be taken most strongly against the grantor. . . . There are, I think, great difficulties in the question, but in the other mode of considering the case those difficulties are gotten rid of altogether

and it falls within all the authorities, which are not controverted even by the plaintiff." The rule thus laid down by Lord Kenyon has ever since been the rule in England and in this country. In *Collins v. Prentice*, 15 Conn. 39, 38 Am. Dec. 61, it was held to apply by one purchaser against another at probate sale made by executors under order of court, both purchases being made on the same day and as parts of same estate. In *Pernam v. Wead*, 2 Mass. 202, 3 Am. Dec. 43, it was held to apply in favor of a debtor as against a creditor who had taken part of the debtor's land under execution, leaving him no passage to the highway. In *Taylor v. Townsend*, 8 Mass. 411, 5 Am. Dec. 107, it was held to apply in favor of a creditor as against a debtor when the creditor had certain lands set off to him under execution but no way of reaching them except on the lands of the debtor not so set apart. In the late case of *Schmidt v. Quinn*, 136 Mass. 575, the rule was again applied as against the judgment debtor in favor of the party holding under the execution. The court, in discussing the case, said: "We see no reason why the rule of law should not be the same where the grant is involuntary as by the levy of an execution, even although a right of way might have been expressly included in the levy but was not." It was applied to purchases made by tenants in common in *Smyles v. Hastings*, 22 N. Y. 217, and to mutual deeds arising on the settlement of an estate. (*Palmer v. Palmer*, 150 N. Y. 139; 55 Am. St. Rep. 653.) It was applied in favor of mortgagor purchasing at foreclosure sale as against the mortgagee and over lands not described in the mortgage in the well-considered case of *John Hancock Mut. Life Ins. Co. v. Patterson*, 103 Ind. 582, 53 Am. Rep. 550, and in *Ellis v. Bassett*, 128 Ind. 118, 25 Am. St. Rep. 421, the same rule was held to apply against the purchaser from the widow of Bassett of a five-acre tract of land which had been set apart to her in partition proceedings in the estate of her husband and in favor of the purchaser at administrator's sale of the other part of the real estate. This court in *Blum v. Weston*, 102 Cal. 362, 41 Am. St. Rep. 188, applied the same rule in partition proceedings as to parties holding under the decree of the court. The court approved the rule as announced in *Ellis v. Bassett*, *supra*, and

held that the decree had the effect of vesting the title in the different parties and that the rule would apply precisely as if they had conveyed to each other. Further authorities supporting the rule are: *Russell v. Jackson*, 2 Pick. 574; Jones on Easements, secs. 309-12; Washburn on Easements, 261; Goddard's Law of Easements, 269. It is claimed with considerable plausibility that the sale freed the homestead from the lien of the mortgage, and that under Civil Code, sections 1240-42, the homestead cannot be invaded even for the purposes of a way of necessity. We have carefully examined the authorities cited and we think the rule applies to the homestead in this case. The land was all mortgaged by Dodge for his indebtedness. By the mortgage and at the date of its execution he authorized the mortgagee, in case the debt was not paid, to sell the land for the purpose of paying it. The filing of the homestead only protected the premises therein described from future liabilities, and gave the mortgagor or his wife the right in foreclosure proceedings to have the land not included in the homestead sold first, and if the proceeds should be sufficient to pay the debt to have the homestead reserved from sale. The homestead did not relieve the property therein described from the lien of the mortgage. If the mortgagor had sold the four lots, the defendant Emily joining in the deeds, the rule would apply to them. The premises were sold by Dodge through the decree of court under the authority given when the mortgage was made, at which time there was no homestead upon the premises. For the benefit of defendants in the foreclosure proceedings the decree provided that the land should be sold in five different lots, and that if the first four lots could be sold for enough, then lot 5 should be saved as a home. If the purchaser of lot 4 could not use the same because of no way to reach it, and that fact had been announced at the sale, the homestead might have had to be sold under the decree. To apply the rule to the purchaser of lot 4, and against the very person who was benefited by its sale, seems to us to be just and in accordance with the authorities. This disposes of the vital point in the case, and the judgment of the court below being in accord with what has been said, we would not feel justified in disturbing it for errors in the

trial or proceedings unless material injury has been done. It is claimed that plaintiff's cause of action is barred by the statute of limitations, but it is sufficient to say that the statute is not pleaded, even if it applied to the facts of this case. Counsel seem to have been of the same opinion, as they asked leave to file an amended answer pleading the statute of limitations long after the case was tried and submitted, and they now claim it was error in the court to deny their application. Amendments to pleadings are left much to the discretion of the court below, and it is presumed that such discretion will always be exercised in furtherance of justice and with the end in view of disposing of cases upon their merits. We cannot interfere except in cases where such discretion is abused. In view of the fact that the application was made after the case had been submitted and was made for the purpose of allowing defendant to plead the statute of limitations, we cannot say that the court abused its discretion. It is claimed that the complaint does not state facts sufficient to constitute a cause of action because it states that defendant Emily Dodge is the owner seised in fee and entitled to the possession of lot 5, and, further, because there is no description of the right of way claimed in the complaint. The complaint sets forth the facts as to the ownership by different parties and the claim of plaintiff to the way. It would have been difficult to describe a way which had been denied to plaintiff and the location of which the defendant had the right to dictate. No demurrer was filed in the court below and no objection was made during the trial to the complaint. The case was tried upon the theory that it was sufficient. In view of these facts, and in view of the fact that the parties have stipulated as to the proper description of the way in case the law adjudges that one exists, we must now hold the complaint sufficient. It is said the evidence is insufficient to justify finding four as to the date of recording the declaration of homestead, and that it was recorded September 22, 1885, instead of December 17th, as found by the court. The date is wholly immaterial as we view the case. Granting that the homestead was recorded September 22d, it would not change the views here expressed. Other findings are objected to, but we think there is evidence to support them.

The questions asked of the witness Dodge to which objections were made do not appear to have been improper. As to whether or not there was a well-defined road along Calaveras creek, and as to which was the most convenient way to reach the highway, were facts tending to throw light upon the necessity for a way over the lands of defendant.

We think the judgment and order should be affirmed, and so advise.

Britt, C., and Haynes, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are affirmed.

Henshaw, J., Temple, J., McFarland, J.

Hearing in Bank denied.

[L. A. No. 488. Department Two.—June 16, 1899.]

U. YNDART, Respondent, v. N. C. DEN, et al., Appellants.

FORECLOSURE OF MORTGAGE—SALE UNDER DECREE—APPEAL—MODIFICATION—EXCESS OF INTEREST—RESTITUTION.—Where mortgaged property was sold under a decree of foreclosure, prior to an appeal therefrom which was taken one day before the time for redemption expired, without any stay bond, and the judgment was merely modified upon the appeal as to an excess of interest allowed, and affirmed in other respects, the defendant is not entitled to have the sale under the decree set aside, and is only entitled to restitution of the excess of interest.

ID.—DISCRETION AS TO RESTITUTION—SETOFF OF RENTS AND PROFITS.—

The court has discretion in the matter of restitution; and where it appears that the defendant, after the sale, received rents and profits to which the purchaser was entitled, to an amount greater than the excess of interest included in the judgment, the court may, in its discretion, allow such rents and profits as a setoff to such excess.

APPEAL from an order of the Superior Court of Santa Barbara County denying an application to set aside a sale under foreclosure and to restore the property sold.

W. S. Day, Judge.

The facts are stated in the opinion.

John J. Boyce, Bishop & Wheeler, and J. W. Taggart, for Appellants.

Richards & Carrier, for Respondent.

CHIPMAN, C.—Appeal from an order modifying the judgment herein, but refusing to set aside a sale made under the original judgment and restore the property so sold.

The action was for foreclosure of mortgage, in which judgment was entered May 14, 1895. On June 8, 1895, the mortgaged premises were sold, and on the same day the sheriff made return of full satisfaction of the judgment, and on December 10, 1895, his deed was made to the plaintiff as purchaser. On December 7, 1895, the day before the time for redemption had expired, defendants appealed from the judgment of foreclosure to this court; its decision was rendered April 23, 1897, and is reported in *Yndart v. Den*, 116 Cal. 533; 58 Am. St. Rep. 200. The judgment here was that the original decree included interest in excess of that which should be allowed, and the cause was remanded, with directions to modify the decree in this particular "as of the date when the judgment appealed from was entered; and when thus modified and entered the decree will stand affirmed." *Remittitur* was filed in the lower court May 26, 1897. Thereupon defendants served notice that they would, on June 4, 1897, move the court to modify said decree, as originally made and entered, "in accordance with the decision of the supreme court in said matter;" and that "by virtue of said modification and decision . . . to set aside the sale of the property made by the sheriff . . . as shown by the return of the sheriff filed in said cause; and to make restitution to said defendants of all property and rights lost by the said erroneous judgment and decree of said superior court," et cetera. The motion was to be heard upon the papers on file in said cause and on the affidavit of defendant N. C. Den. In his affidavit defendant Den avers that he is the husband of defendant Isabel Den, to whom the mortgaged premises belonged, and as her agent has attended to all business connected with said action, and is more familiar with the same than the said Isabel; that the property sold for seventeen thousand seven hundred and eleven dollars and one cent, and plaintiff became the purchaser to whom certificate of purchase was issued, and to whom on December 10, 1895, the sheriff delivered his deed to said property, and that plaintiff thereupon went into possession and has

ever since remained in possession thereof under said deed; that at that time and now, said property was of the market value of twenty-five thousand dollars, and that the rents and incomes amounted to two thousand five hundred dollars, which plaintiff received, and that the property would now sell for a sum in excess of the judgment as modified by the said supreme court; that the incomes have been in excess of the amount of interest which would have accrued from the date the judgment was authorized to be entered under the order modifying the same.

Plaintiff filed objections, and claimed that defendant's application did not state sufficient grounds for the modification as asked nor for the restitution of the property, and that the court has no jurisdiction to make such modifications, "there being no judgment in force or existing, the same having been fully satisfied before appeal taken"; and "the court has no power to grant restitution for said property as applied for." With the objections and in support thereof plaintiff made affidavit in which he denies that the property was worth any sum over fifteen thousand dollars; denies that the incomes were two thousand five hundred dollars, or any sum greater than the expenses, or that he has received any sum greater than the expenses per annum; avers that it is impossible to state whether or not the property on resale would bring more than the full amount of the modified judgment; avers that no appeal was taken until the day before redemption from the sheriff's sale expired; that immediately after the sale defendants stated to plaintiff that they could not obtain water for the preservation of the premises and the orchards thereon, and that it was impossible for the said Isabel, the owner of the property, "to carry on or preserve or cultivate said property, as she had not and could not obtain the means for the purpose; and she then proposed that affiant (plaintiff) should go into the possession of the property, take charge of and care for the same and procure water for the use thereof, and advance the necessary funds for the care, management, and cultivation of the same, upon the understanding and agreement that affiant should hold possession and perform such acts until the said property was redeemed, or the time for redemption had ex-

pired, and that in case she redeemed the property she would pay affiant all costs and expenses incurred by affiant during the time affiant had possession, and in case she failed to redeem the same affiant was to make no charge against her"; avers that he went into possession under this agreement, which defendants afterward ratified, and remained in possession under said agreement until the expiration of the time of redemption and issuance of the sheriff's deed; that upon issuance of the deed by the sheriff he was put into formal possession by writ of assistance issued out of the court in which the action was commenced in 1896, and has remained in possession ever since; that during the period of redemption he expended the sum of thirteen hundred dollars in necessary labor, in the purchase of water and care of the premises, and to preserve the property from being impaired and destroyed, and that without such expenditure and care the property would have been impaired in value at least thirty per cent of the price paid by plaintiff at the sheriff's sale; that plaintiff was the only bidder at the sale; that no other bidder could have been found at that time who would have paid over fifteen thousand dollars for the property, and that the property was not then worth the amount of said judgment as modified by said supreme court; that plaintiff "received none of the rents and profits of said property, but defendants received and appropriated to their own use all thereof, and the same were in value more than the amount in which said judgment was modified by the supreme court, and were of value more than fifteen hundred dollars, and defendants have not paid or accounted to affiant for the same." This affidavit of plaintiff is not controverted.

The motion was heard upon the foregoing affidavits and upon the judgment-roll as contained in the transcript in the case on appeal here and the decision of this court of April 23, 1897. The court below modified the decree as directed by this court—*i. e.*, reduced the judgment from sixteen thousand nine hundred and twenty-six dollars and seventy cents to sixteen thousand four hundred and fifty-six dollars and fifty-one cents, as of the date when the judgment was entered; in all other matters the motion was denied. Defend-

ants appeal from this order on bills of exceptions in which the foregoing proceedings appear.

The first appeal was upon the judgment-roll alone, and no stay bond was filed. The only error corrected by the appeal was in the computation of interest. The judgment of the trial court was not reversed; it was modified in this one particular of interest, which the court below found to amount to four hundred and seventy dollars and nineteen cents, and the judgment was to retain its date as when first entered and when modified to stand affirmed.

Section 957 of the Code of Civil Procedure provides as follows: "When the judgment or order is reversed or modified the court may make complete restitution of all property and rights lost by the erroneous judgment or order," et cetera. Section 1049 of the Code of Civil Procedure provides as follows: "An action is deemed to be pending . . . until the time for appeal has passed, unless the judgment is sooner satisfied."

The judgment was satisfied against the will of appellants, and section 1049 in such case cannot be invoked to abridge the right of appeal. (*Kenney v. Parks*, 120 Cal. 22.)

Section 957 is not mandatory upon the court, but the power to make restitution rests in the discretion of the court. (*Spring Valley W. W. v. Drinkhouse*, 95 Cal. 220.) Leaving out of view, for the moment, the undenied agreement set up in plaintiff's affidavit, defendants lost no rights or property by the execution of the judgment before the right of appeal had expired except in the single item of the excess of interest included in the judgment. Complete justice will be done defendants by repayment of this excess, to wit, four hundred and seventy dollars and nineteen cents; and the statute does not contemplate any greater relief than the "restitution of all property and rights lost by the erroneous judgment or order." Where the judgment is not reversed, a different situation exists from that where there is a modification which does not disturb the foundation of the sale. This distinction is pointed out in *Hewitt v. Dean*, 91 Cal. 617; 25 Am. St. Rep. 227.

Do the matters set up in plaintiff's affidavit work a setoff to defendant's right to have restored to them the excess of interest included in the judgment? It will be noticed that there was no agreement as to which of the parties was to have the rents and profits of the property. Plaintiff was entitled by law to the rents during the period of redemption. (Code Civ. Proc., sec. 707; *Walker v. McCusker*, 71 Cal. 594.) In support of the order it must be assumed that the

facts stated in plaintiff's affidavit are true. It is there stated that defendants received of rents and profits a sum greater than the excess of interest included in the judgment. In dealing with the question of defendants' right to restitution we think the court could take into consideration the rents received by defendants. We are unable to discover from the facts as they appear that the court erred in its conclusion, and it is advised that the order be affirmed.

Haynes, C., and Britt, C., concurred.

For the reasons given in the foregoing opinion the order is affirmed. McFarland, J., Henshaw, J., Temple, J.

[S. F. No. 1119 Department Two.—June 16, 1899.]

HELEN M. MOORE, Appellant, v. ALICE HOFFMAN and
WILLIAM C. HOFFMAN, Respondents.

ESTATES OF DECEASED PERSONS—PROBATE HOMESTEAD—TENANCY IN COMMON—RIGHT OF POSSESSION.—The right of possession of a probate homestead set apart out of the estate of a deceased person to the widow and minor children, the title of one-half of which was to go to the widow, and the other half to the minor children, is in the widow and minor children during their minority; and after their majority their rights as tenants in common are only in the nature of those of remaindermen or reversioners, and the widow is entitled to the possession of the homestead, so long as she desires to maintain it, and until it is legally extinguished; and neither an adult child nor the grantee of such child is entitled to be let into possession with the widow, as a tenant in common.

ID.—PURPOSE OF HOMESTEAD.—The purpose of a homestead is to secure a home to each and all of those clothed with the homestead right; and the power of one not clothed with such right to enter into possession, as a tenant in common, and interfere with the occupancy and control by the homestead claimants, would be inconsistent with the nature of a homestead, and violative of the purpose for which it is created. The homestead is a place of abode for the family, and no act of any member of the family can in any way prejudice the right of the others to occupy it.

APPEAL from a judgment of the Superior Court of Santa Cruz County. J. H. Logan, Judge.

The facts are stated in the opinion of the court.

Charles B. Younger, for Appellant.

Plaintiff, on the death of her husband, became the head of the family. (*Estate of Moore*, 57 Cal. 443; *In re Moore*, 72 Cal. 341; *Tyrrell v. Baldwin*, 78 Cal. 470.) Her rights of occupancy of the homestead cannot be interfered with, so long as she chooses to occupy it as such. (*Phelan v. Smith*, 100 Cal. 166; *Hoffman v. Newhaus*, 30 Tex. 633; 98 Am. Dec. 492; *Keyes v. Hill*, 30 Vt. 759; *Trotter v. Trotter*, 31 Ark. 145; *Nicholas v. Purczell*, 21 Iowa, 265; 89 Am. Dec. 572; *Walters v. People*, 21 Ill. 178; *French v. Stratton*, 79 Mo. 560; *Ailey v. Burnett*, 134 Mo. 313.)

Frank M. Stone, for Respondents.

McFARLAND. J.—Plaintiff avers in her complaint that she is the owner of the undivided one-half of certain described land, and is entitled to the possession thereof, and that defendants are unlawfully in possession of said land; and she prays for the recovery of the possession of the land from defendants, with damages, et cetera. The defendants, in their answer, admit that plaintiff is the owner and entitled to possession of the undivided one-third of the premises (and afterward, at the trial, admitted that she was entitled to one-half); but they say that the defendant Alice is the owner of an undivided interest in the land as tenant in common with plaintiff, and they claim only the right to hold possession jointly with plaintiff as tenant in common. The jury found for the defendants, for whom judgment was rendered; and plaintiff appeals from the judgment and from an order denying her motion for a new trial.

Appellant makes many points for a reversal which, under our view of the case, need not be discussed; for, waiving all contentions of appellant as to minor matters, the court erred as to the leading questions in the case which goes to the real merits of the controversy.

William H. Moore died intestate seised of the land in question, leaving a widow, the appellant herein, and three minor children, Charles Moore, Stella Moore, and William M. Moore. Afterward and during the administration of his estate, to wit, on April 26, 1881, the court in which the

administration was pending duly set apart the land in question here as a probate homestead to the appellant, as widow, and the minor children—the order setting it apart declaring that one-half should go to the widow and the other half to the children, or one-sixth to each of them. On September 11, 1889, Charles Moore, one of the children, who had then attained his majority, conveyed by deed to Alice Hoffman, one of the respondents, an undivided two-fifteenths of an undivided one-sixth of the land. And under this deed the said Alice, and the other respondent, her husband, William C. Hoffman, who was also made a party defendant, claim the right to possession as tenants in common with appellant. It does not expressly appear whether or not the other two children had attained majority at the time this suit was commenced, although according to certain dates which the record shows they probably had; and, for the purposes of the case, we will assume that all the children were of legal age at the time of the commencement of this action, as that view is the most favorable to respondents.

The question in the case presented by the forgoing facts is, Can the grantee of one of the children in a case like this legally go into possession of the homestead as the tenant in common with the widow? The question arose in various ways, and principally upon the instructions of the court to the jury. The court instructed that if Charles Moore deeded an interest to Alice Hoffman, as above stated, then “that unless it had been shown by evidence that Alice Hoffman has since disposed of her interest in said land, that she is and has been since said date a tenant in common with plaintiff, and you must find for the defendants,” and that her husband had a right to be in possession with her; and refused to instruct that neither of the children “could give any right to any person to the possession of said homestead against said plaintiff.”

The purpose of a homestead is to secure a home to those clothed with the homestead right—to each and all of them; and the power of a stranger to enter into the possession of the land, and, as a tenant in common, to interfere with its occupancy and control by the homestead claimants, and to have it partitioned, or sold if division be impracticable, would

be inconsistent with the very nature of a homestead, and violative of the very purpose for which homesteads are created. Probate homesteads are, of course, for the benefit of minor children, when there are such, as well as the surviving wife or husband, and our attention has not been called to any adjudication in this state where in such a case the grantee of a child has undertaken to disturb the possession of the other homestead claimants; but the principle which is clearly applicable to the case at bar was declared and applied, where the party asserting the right of possession was the grantee of the widow, in *Hoppe v. Fountain*, 104 Cal. 94. In that case, where a probate homestead had been set apart to the widow and minor children, the widow had mortgaged all her interest in the homestead premises, and it was held that a purchaser at the foreclosure of the mortgage had no right to possession as against the minor children until their homestead rights had ceased, which would occur at their majority. The court announced the principle above stated as follows: "The homestead is a place of abode for the family, and no act of any member of the family can in any way prejudice the rights of the others to occupy it." Counsel for respondents seems to think that the Hoppe case decides that the rights of all the homestead claimants ceased when the children arrived at majority, because the court said that the premises were to "remain as a homestead without any power in either of the parties interested to destroy its quality as a homestead until after all of the children shall have arrived at majority," and "it must remain intact until the youngest child has reached its majority." But this language was used in a case where the rights of the minor children were being asserted as against the acts of the widow—not where the rights of the widow were being asserted as against the acts of the children. When the children arrive at majority their interest in the homestead, as a homestead, ceases, for they no longer constitute a part of the family, and whatever property rights they thereafter have in the land covered by the homestead are in the nature of those of remaindermen or reversioners. After their majority the widow, being the only homestead claimant left, could, of course, dispose of her interests in the land, because there would then be no other

homestead claimant to contest her right to do so; and it was in view of this situation that the court said in the Hoppe case that she could not destroy the homestead while any of the children were minors. But exactly the same principle applies in favor of the widow as against the grantee of a child; such grantee cannot disturb her possession until her homestead right has been extinguished either by her own act or by operation of law, and it cannot be extinguished by any act of one or all of the children, either before or after their majority. The rights of a homestead claimant cannot be affected by an instrument in writing to which such claimant is not a party. (See *Phelan v. Smith*, 100 Cal. 166.) The governing principle is, that the homestead right continues in favor of any one of the family for whom it was created as long as he or she asserts it and remains in a position to assert it.

This rule has been declared in other states, for, while not many of their statutory provisions about homesteads are exactly like ours, still they are sufficiently similar to make the principle applicable. (See cases cited in opinion of Harrison, J., in *Hoppe v. Fountain*, *supra*.) In *Keys v. Hill*, 30 Vt. 768, the supreme court of Vermont declares the law as follows: "We think the clear design of the law is to continue the homestead entire, as the home of the widow, or of the widow and children constituting the family at the decease of the husband, housekeeper, or head of the family, and that no rights of the children become operative to sever or divert such homestead from full occupancy and enjoyment as a family home, as long as the widow, or widow and children, see fit to continue it as such family home."

The judgment and order appealed from are reversed.

Temple, J., and Henshaw, J., concurred.

[Crim. No. 512. In Bank.—June 16, 1899.]

THE PEOPLE, Respondent, v. J. I. HARRIS and
GEORGE CARDWELL, Appellants.

CRIMINAL LAW—HOMICIDE—SELF-DEFENSE—DISPUTED RIGHT TO USE
OF ROAD—OVERT ACT.—In case of a homicide occasioned by a dispute over the right to the use of a road across the premises of the deceased, where each of the parties was fully armed, and deter-

mined at all hazards to maintain his claim, the question of self-defense is independent of the respective rights of the parties to the road; and the one who by some overt act first caused a reasonable apprehension of danger of loss of life or limb to the other, must take the consequences.

ID.—CONVICTIONS OF MANSLAUGHTER—SUPPORT OF VERDICT.—Where there is evidence, in such a case, from which the jury might find that, at the time of the killing, the deceased had committed no overt act which justified the killing, a verdict convicting the defendants of manslaughter will not be disturbed upon appeal.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order denying a new trial. B. N. Smith, Judge.

The facts are stated in the opinion of the court.

R. A. Ling, and Frank F. Davis, for Appellants.

Tirey L. Ford, Attorney General, and A. A. Moore, Jr., Deputy Attorney General, for Respondent.

GAROUTTE, J.—Defendants have been convicted of manslaughter, and appeal from the judgment and order denying their motion for a new trial. It is insisted that the evidence shows a case of justifiable homicide. The facts, briefly stated, are as follows:

The deceased, by a wire fence, closed a road extending across his premises. Two of his neighbors, these defendants, claimed the right to travel upon this road. Ill-feeling arose, and deceased informed them that if they attempted to pass over the road he would kill them. Some days thereafter the defendants in a wagon, armed with shotgun and rifle, a third man driving the horses, started to travel over the forbidden road. They cut the wires of the fence, passed on, and as they approached the house of the deceased he left his plow standing in the field, went to the house, and reappeared with his rifle in his hands. At this time defendants were about two hundred feet distant. They continued upon their way, one or both of them upon the ground by the side of the wagon, each with a gun in his hand; the deceased started from the house, angling toward a large tree which stood some distance in front of defendants and near the road. There is evidence that at this point of time defendants ordered deceased to stop and to drop his rifle. There is also evidence that deceased, at about the same time, ordered de-

defendants to turn and retrace their steps. As deceased was about to pass from the view of defendants behind the tree, and some nineteen feet distant therefrom, they fired at him, and he fell upon the ground dead. This point was sixty-five feet distant from the wagon. The position in which deceased held his rifle at the time he was killed is not clearly disclosed. Yet from the evidence the jury would have been justified in saying that it was not pointed toward defendants.

From the foregoing evidence the jury had the right to declare that this affray arose between three desperate, determined men; that these defendants began their journey with the intention to travel over the premises of the deceased at all hazards, and that deceased, when he saw them, intended to stop them at all hazards. Upon such a state of facts any question, legal or equitable, as to the respective rights of these parties in the road, becomes wholly immaterial. In this regard the case is similar to *People v. Conkling*, 111 Cal. 621, where the court said: "If it be assumed that at the time of the killing deceased was at the opening in the fence for the purpose of preventing the defendant at all hazards from going through, and if it also be assumed that defendant was there intending to pass through at all hazards, still the question of self-defense is presented to the jury, regardless of the respective rights of the parties to the road. Under such circumstances, the man who began the deadly affray—that is, who by some overt act caused the other as a reasonable man to believe that he was in danger of loss of life or limb placed himself without the protection of the law and must take the consequences, whether those consequences be his death upon the ground, or the penalty imposed after trial by judge and jury."

Looking at this picture formed from the evidence, we deem the showing made ample to support the verdict. We see but little difference, viewed with the eyes of the law, in the relative positions of these three persons at the moment prior to the shooting. While, if the positions had been reversed and deceased at that moment had fired and killed the defendants—and such killing would have been manslaughter or worse—still it does not follow that defendants may not be guilty. Certainly, if the purpose of deceased was to place

himself in the road in front of defendants and thereby try and stop them from proceeding further on their way, and his rifle was lying upon his arm, not pointed in the direction of the defendants, then they had no right to shoot when they did; for there was no overt act by deceased at that time which justified them in taking his life. Under the evidence the jury were authorized in declaring the conditions to be such as here suggested. The theory of defendants probably was that deceased was about to use the tree for a barricade, and, safely esconced behind it, shoot them down. Yet the deceased could well have used his house for that purpose and never have ventured into the open at all. These things were all matters for the jury to weigh and gauge and reason upon, and matters upon which their conclusion cannot be set aside by this court. As already suggested, from the evidence the jury had a right to say that these three men were within a few hundred feet of each other, in plain view, guns in their hands, fingers upon the trigger, enmity and deadly determination in their hearts. The jury had the right to say that at this time they all stood upon common ground, and that the light of the law shone upon all alike. An overt act at this critical period was bound to cause a tragedy; and the jury were justified in saying under the law and the facts that the defendants should not have fired the fatal shots.

We have examined the instructions given and refused, and find nothing demanding a reversal of the judgment. There is no error in the record.

For the foregoing reasons the judgment and order are affirmed.

Van Dyke, J., Harrison, J., McFarland, J., Henshaw, J., and Temple, J., concurred.

BEATTY, C. J., dissenting.—I dissent. The claim upon the part of appellants that the verdict of the jury was against the evidence cannot be upheld. There was clear proof of a voluntary killing, from which the law raised a presumption of malice. To rebut this presumption the burden of proving self-defense devolved upon defendants, and, since the jury were not bound to believe the testimony of their witnesses, it cannot be said, as matter of law, that the verdict is with-

out evidence to sustain it. I cannot, however, agree with the view of the evidence taken in the opinion of the court, wherein it seems to be held that even if it is accepted as true it does not make out a case of self-defense.

The road in question was one which had been used by the defendants and others for years, and was the only means of ingress and egress to and from the valley for loaded wagons. The deceased, when he came to live on the place where he was killed, found the road open and in common use across the public land upon which he was merely a settler, and the evidence shows without contradiction that he sought and obtained the consent of his neighbors, including these defendants, to inclose this road upon the express condition that he should construct a new road outside of his inclosure in all respects as good as the old road. In pursuance of this agreement he put a wire fence across the old road, and made a pretense of constructing a new one, but the evidence, which is wholly uncontradicted, abundantly shows that the new road was impassable for loaded wagons. It was with difficulty that half a load could be hauled over it, and defendants and others were obliged to make two trips to bring in one load. The defendants could not market their produce or obtain supplies for their families. Under these circumstances, they announced to deceased their intention to resume the use of the old road, whereupon he plainly told them that he would kill any man who attempted to pass that way.

Emphasis was imparted to this threat by the notoriously bad character of deceased. The evidence shows abundantly and without contradiction that he was a quarrelsome, turbulent, and dangerous man, always armed and ready on every occasion to resort to violence. The defendants, on the contrary, were shown to have been men of quiet and peaceable disposition. This, then, was the situation of affairs: The defendants, by the wrongful act of the deceased, were shut off from the only practicable road by which they could take their produce to market or bring in supplies for their families. They were in urgent need of relief; they had a clear legal right to travel over the old road; the obstructions erected by deceased constituted a public nuisance, which they

were authorized to abate, but they were warned by deceased that their lives were to be the forfeit if they attempted to exercise their rights. What were they to do? They had the choice to submit to a lawless invasion of their rights, or to assert them. They chose the latter alternative, and, in my opinion, made the proper and manly choice. Nor are they to be blamed for going armed if their only intention was to defend themselves against a felonious assault, and there is not a particle of evidence that they intended to make any other use of their arms. The open threats of deceased, his notorious bad character, and his constant state of preparation for deadly hostilities, warranted the apprehension that they might be called upon to defend their lives, and his subsequent conduct justified their precautions.

They entered upon the road without any breach of the peace, and when deceased saw them he left the field where he was at work, proceeded directly to his house, without saying a word, armed himself with a repeating rifle and made for the secure shelter of a large live-oak tree. But one construction could be put upon his conduct, and that was that he was seeking a position from which he would hold the others at his mercy, and no reasonable man could have avoided the conclusion that their lives were in imminent danger. He was shot when he had only six feet to go to shelter himself behind the tree, and after he had been repeatedly warned to stop by the defendants, according to the testimony of their witnesses. The wife of the deceased, the only other eye-witness of the affair, testified that she had heard no such warning, and to this extent and upon this point alone the evidence is conflicting. Upon the evidence, therefore, assuming it to be true, I consider the plea of self-defense to have been well sustained. But, as above stated, there was against this evidence a legal presumption of malice, from the voluntary killing; and, upon the theory that the jury discredited the testimony for the defense, the verdict may be upheld.

I see no reason, however, why the evidence for the defense should have been discredited. So far as it appears upon the record, the witnesses were fair and disinterested, as they were wholly unimpeached. Their testimony makes out a case

in which the deceased, a bad and dangerous character, was grossly in the wrong, in which he was clearly the aggressor, and in which the defendants, while peaceably exercising their legal rights, were forced to defend their lives.

Such being the case I think we are justified in scrutinizing closely the instructions of the court on the law of self-defense in order to discover whether they were as full and clear and explicit as the defendants had a right to demand.

As to most of the charge of the court there is no criticism to make, but there were three instructions proposed by the defendants in which the jury were told that if they believed certain facts to have been established, then the killing was justifiable, and they must acquit the defendants. It is conceded that these instructions were correct as framed, but the court modified each of them by substituting, for the direction to acquit, the formula that (in the case supposed) the defendants "had the right to defend themselves even to the taking of the life of Hilton." This action of the court is defended upon the ground that the instructions meant just the same thing after the alteration as before. It is perhaps true that they do mean, to a lawyer, just as much in one form as in the other, but evidently the judge of the superior court thought that in their modified form they would carry some different meaning to the jurors, else why should he take the trouble to make the change? The question for the jury was, What should be their verdict? In the instructions as prayed they were told, and correctly told, that their verdict, in view of certain supposed facts, should be not guilty; in the altered form of the instructions they were merely told that on the same state of facts the defendants had a right to defend themselves even to the extent of taking life. It is true that to any lawyer, and probably to most laymen, the conclusion from this proposition would appear inevitable that the defendants should be acquitted. But why, when an instruction is properly framed, and states the proper verdict to be rendered upon the hypothetical case, should the court emasculate it by striking out the conclusion and substituting in its place a proposition from which the conclusion can only be inferred?

I think the defendants should have a new trial.

[S. F. No. 1179. Department One.—June 17, 1899.]

ALAMEDA COUNTY, Respondent, v. MARY IVES
CROCKER et al., Defendants. ISABELLA E. JORDAN, Appellant.

CONDEMNING LANDS FOR HIGHWAY—GENERAL AND SPECIAL FINDINGS—

REFERENCES TO PLEADINGS—CERTAINTY.—In an action to condemn lands for a public highway, a general finding "That all the facts alleged in the complaint are true, except as to those hereinafter specified," and special findings following, which are inconsistent with certain allegations of the complaint as to all of the property sought to be condemned, and which specifically set forth the ownership, acreage, value, damages, and benefits to the tracts belonging to the defendants, about which any issue was presented, and which covered the entire lands in controversy, are not uncertain or obscure, and necessarily exclude the idea of any ownership in a fictitious defendant named in the complaint, with respect to which no issue was joined.

Id.—DEFENDANTS SUED BY FICTITIOUS NAMES—AMENDMENT TO COMPLAINT—JUDGMENT UPON APPEAL.—Where defendants sued by fictitious names, were served, and appeared and answered by their true names, the complaint must be amended to insert their true names, but where such amendment was not made, and the specific rights in the land condemned of all persons sued by fictitious names were in fact determined, the absence of the amendment is not ground for ordering a new trial; but the judgment upon appeal will direct the lower court to amend the complaint as of date prior to the judgment, in order to support the judgment.

Id.—PREMATURE JUDGMENT AS TO ONE DEFENDANT—FINAL JUDGMENT—VACATION—PRESUMPTION UPON APPEAL.—Where the court improperly entered a premature judgment condemning the interest of one defendant not appearing, before other defendants had appeared and answered, and properly included the interest of that defendant in the final judgment of condemnation of the interests of all the defendants, it will be presumed, upon appeal of another defendant that the court made an order vacating the premature judgment, and such judgment must be deemed harmless as to the appellant.

Id.—COSTS—APPEAL FROM JUDGMENT—PRESUMPTION.—Where no costs were awarded to the defendants, whose lands were condemned, and the appeal is from the judgment, upon the judgment-roll alone, and there is nothing in the record to show whether a cost bill was presented, or what items of costs were claimed, it must be presumed, in support of the judgment, that appellant failed to present a cost bill showing items properly chargeable to plaintiff.

APPEAL from a judgment of the Superior Court of Alameda County. F. B. Ogden, Judge.

The facts are stated in the opinion.

R. E. Hewitt, for Appellant.

Charles E. Snook, District Attorney of Alameda County, for Respondent.

CHIPMAN, C.—Action to condemn lands for a public highway in the county of Alameda. There were twelve defendants named in the complaint, four of whom were sued by the fictitious names of John Doe, Richard Roe, John White, and James Black; Mary V. Baldwin, George W. Patterson, R. W. Allen, and Catharine M. Allen, whose names do not appear in the complaint, appeared as defendants. George W. Patterson answered under the name of Richard Roe, claiming to own the land alleged to belong to A. Patterson; R. W. Allen was served under the name of Richard Roe; Catharine M. Allen appeared by demurrer under a fictitious name not stated; the Allens (R. W. and Catharine) answered “as sued and served under fictitious names” (the fictitious names not stated) claiming to own the land alleged to belong to Mrs. F. J. Hall, alias Phebe J. Hall, defendant named in the complaint, and Mary V. Baldwin appeared by demurrer under the name of John Doe. No amendment of the complaint was made inserting the true names of these four who appeared after the complaint was filed. Defendant Pope defaulting, a preliminary decree was entered against him August 24, 1894, and a final decree October 29, 1894, condemning his lands, and on March 13, 1895, the final decree against Pope was amended as to a description of his lands. Defaults as to all the other defendants were taken, except as to defendants Crocker, Dillon, the Allens, and appellant Jordan, and upon the issues raised by their answers the case was tried August 25, 1896. The court filed findings, and ordered judgment for plaintiff as prayed for. Thereafter, an interlocutory decree and subsequently a final decree were entered, which final decree included all the defendants in the case. From these two last mentioned decrees the appeal is taken by Isabella E. Jordan.

1. The court made the following finding: "That all the facts alleged in the complaint . . . are true, except as to those hereinafter otherwise specified, and as to those allegations the court finds as follows." The court then takes up the parties and the several pieces of property sought to be condemned, and finds specifically as to the ownership, acreage, value, and damages and benefits to the tract belonging to defendants Crocker and Dillon, appellant Jordan, Phebe Hall (found to belong to R. W. and Catharine Allen); and, as conclusions of law, the court finds that Crocker and Dillon, Jordan, and the Allens are entitled to damages.

Appellant contends that the above finding is insufficient because uncertain and obscure. It is said: "It may mean that it was the intention of the court to indicate subsequently in its findings those allegations which it found to be untrue; or it may mean that all the allegations of the complaint were true except so far as inconsistent with the facts subsequently found." It is claimed that if the former of these intentions is to be taken as the purpose of the court, it failed to point out the allegations it intended to declare to be untrue; and if the second construction suggested be the true one, then the general finding in question would not comply with the code. (Citing *Johnson v. Squires*, 53 Cal. 37; *Harlan v. Ely*, 55 Cal. 340; *Bank of Woodland v. Treadwell*, 55 Cal. 379.) We think the natural reading of the finding is, in effect, that all the facts alleged in the complaint are true, except as to those facts therein alleged and in the findings otherwise specified, as to which the facts are not necessarily untrue, but are as found specifically by the court. In the cases cited the finding left something undetermined, so that the court could not ascertain precisely what facts had been found. Here the finding is that the facts set forth in the complaint are true except as to certain particulars, and as to these the facts are as specifically found. For example: The complaint alleged that the value of the land belonging to defendants Crocker and Dillon does not exceed one dollar; the finding is that its value is fifty dollars; and so as to appellant's land, sought to be condemned, which was alleged to be of the value of one dollar, the finding is that it is of the value of sixty dollars; certain land is alleged to belong to Phebe Hall, and the court

found that the Allens were the owners. But it is said, that if the findings be sufficient, then it adopts as true the allegation of the complaint that the four fictitious defendants have or claim to have some interest in the property sought to be condemned, and that this finding is capable of the construction that the fictitious defendant sued as James Black is not merely an encumbrancer, but the owner of the whole, or a portion of, or an undivided interest in, the lands specially found to belong to defendants Crocker, Dillon, Allen, or Jordan, and if this be so the two findings destroy each other. This might be true if there had been an unqualified finding that Black is the owner of an interest in any of the lands found to be entirely owned by some one or more other defendants, and if Black had been a real party and there was any issue made as to his interest. But the court found specifically as to the ownership of all the lands sought to be condemned and as to all lands about which there was any issue presented. This finding necessarily excluded the idea of any ownership in Black and was in effect a finding against him.

2. It is contended that the judgment is erroneous as to the Allens, Patterson, and Baldwin, as to whom the complaint was not amended. (Citing *McKinlay v. Tuttle*, 42 Cal. 572; *Baldwin v. Bornheimer*, 48 Cal. 434.) In *McKinlay v. Tuttle*, *supra*, certain defendants, the Castros, were served by fictitious names and appeared and answered, but the complaint was not amended by inserting therein their true names, and it was held under section 69 of the practice act, that when the true name is discovered the pleading must be amended if it is intended to bind such person by the judgment. And this has been held to be the law under section 474 of the Code of Civil Procedure. (*Bachman v. Cathry*, 113 Cal. 498.) In the case cited in 48 California, *supra*, the rule in *McKinlay v. Tuttle*, *supra*, was approved, and the court affirmed the order denying a new trial, but ordered the lower court "to amend the complaint or cause the same to be amended, as of date prior to the judgment in said court, by the insertion therein of the name of Engel Bornheimer as a party defendant."

I think it essential that there should be a valid judgment against all defendants whose lands are sought to be con-

demned (*Butte County v. Boydston*, 68 Cal. 189); and that the judgment, without amending the complaint, cannot be supported (*Bachman v. Cathry*, *supra*); but I think the course pointed out in *Baldwin v. Bornheimer*, *supra*, should be followed. There is no necessity or reason for subjecting the parties to a new trial on account of the failure to amend the complaint in the particular complained of.

The point that the judgment is erroneous because it fails to ascertain and determine the specific rights, in the land condemned, of the defendants sued by fictitious names is disposed of by what has already been said. There are no such lands the specific rights in which have not been determined.

3. It is claimed that when the court rendered judgment against Pope it exercised its powers and exhausted them for the purposes of the action, and the subsequent judgment must be void. It appears that on August 24, 1894, the court ordered that plaintiff pay to Pope the sum of one dollar within thirty days, and "that upon such payment being made, within said time, the final order condemning and taking said strip of land be made and entered." This order was entered before appellant and some other defendants had answered. After the answers of some, but not all, of the defendants appearing were filed, the court on October 29, 1894, "ordered, adjudged, and decreed" that "all the estate . . . of the defendant R. T. Pope . . . and the same are hereby condemned for the purpose of a highway." On the same day, the court made and entered an amended order, as to Pope, referring to what it terms the "preliminary order of condemnation made and filed in this court on the twenty-fourth day of August, 1895 [should be 1894]." Appended to this order is an order dated March 13, 1895, reciting that an error was made in the description of the land contained in the order first made on October 29, 1894, and declares that the true description is as in the last order of that date. Some of the defendants appeared by answer or demurrer after this order was entered; and finally, on April 25, 1896, the cause was tried and the court made its findings and entered its decree adjudging the rights of all the parties, including Pope, and on July 25, 1896, the court entered its final decree of condemnation as to all the land sought to be condemned and as to all the defendants, including Pope. The court apparently treated the earlier orders or decrees made by it as prematurely entered and inoperative; and in support of the judgment it may be presumed that the court made an order vacating the first orders as to Pope. Those orders did not purport to adjudge the rights of any of the other defendants or con-

demn any of the other lands; nor could the court have done so at that stage of the proceedings, for some of the defendants had not yet answered. The record was not yet in condition for a final decree. No possible harm came to appellant, and Pope is not appealing. (See the subject discussed in 1 Freeman on Judgments, sec. 16 *et seq.*; *Fox v. Hale etc. Min. Co.*, 112 Cal. 568.) As to the necessity for a final judgment of condemnation as to all defendants, see *Butte County v. Boydstun*, *supra*.

4. It is contended that the court erred in not awarding the defendants, whose lands were condemned, their costs of the action. (Citing *San Francisco v. Collins*, 98 Cal. 259.) That case holds that the power to allow or not to allow costs in condemnation proceedings under section 1255 of the Code of Civil Procedure is limited by section 14, article I, of the constitution (see, also, *San Diego Land Co. v. Neale*, 88 Cal. 50); but it held that the court had discretion to determine what are improper items of cost in proceedings of this kind, and to disallow such as are improper, as in other cases. This appeal is from the judgment and upon the judgment-roll alone. There is nothing here to show whether appellant presented a cost bill or incurred any costs, or that if she did so present a cost bill it contained only proper items of cost. It must be presumed in support of the judgment that appellant failed to present a bill of costs showing items properly chargeable to plaintiff.

We think the judgments appealed from should be affirmed, with directions to the court below to amend the complaint or cause the same to be amended as of a date prior to the judgment of condemnation entered April 25, 1896, in said court, by the insertion therein of the names Mary V. Baldwin, George W. Patterson, R. W. Allen and Catharine M. Allen, as parties defendants.

Britt, C., and Cooper, C., concurred.

For the reasons given in the foregoing opinion the judgments appealed from are affirmed, with directions to the court below to amend the complaint or cause the same to be amended as of a date prior to the judgment of condemnation entered April 25, 1896, in said court, by the insertion therein

of the names, Mary V. Baldwin, George W. Patterson, R. W. Allen, and Catharine M. Allen, as parties defendants.

Harrison, J., Garoutte, J., Van Dyke, J.

[S. F. No. 1259. Department One.—June 17, 1899.]

THOMAS KYLE and B. SARLE, Executors, et cetera, Respondents, v. MARY CRAIG, Appellant.

ACTION TO ENFORCE TRUST—DEMURRER TO COMPLAINT—SEPARATE COUNTS AS TO REAL AND PERSONAL PROPERTY.—A complaint in an action to enforce a trust in real and personal property is not demurrable on the ground that the facts concerning the trust as to the real estate, and as to the personal property, are separately set forth in two counts for one cause of action. No such ground of demurrer is specified in section 430 of the Code of Civil Procedure; and no ground of demurrer not specified in that section can be considered.

ID.—MOTION TO COMPEL ELECTION.—The defendant is not prejudiced by the arrangement of such complaint in two counts, where the facts as to the trust are fully set out; and the defendant cannot, by motion, compel the plaintiff to elect to proceed either upon the trust as to the real estate, or upon that as to the personal property.

ID.—SUFFICIENCY OF CAUSE OF ACTION—DONATION IN VIEW OF DEATH—RECORD OF UNDELIVERED DEED—REFUSAL OF RETRANSFER.—A complaint showing that the plaintiff, in expectation of immediate death, assigned to the defendant, who was his trusted sister, certain savings bank deposits, and further executed and acknowledged a deed of certain real estate to the defendant, which was never delivered; that the assignment and deed were made with the understanding that, after plaintiff's death, the property should be disposed of by the defendant according to certain instructions given by the plaintiff; that there was no consideration for the transfer; that the defendant, without authority or knowledge of the plaintiff, obtained possession of the deed and recorded it; and that, upon the recovery of the plaintiff, defendant refused to retransfer the real or personal property to plaintiff upon demand therefor, and claimed to own the entire property, states a cause of action to enforce a trust, both as to the real and as to the personal property.

ID.—AMBIGUITY—FAILURE TO SET OUT INSTRUCTIONS.—The complaint is not demurrable for ambiguity in failure to set out the instructions which were given in view of death, to be carried out after the death of the plaintiff. The instructions were wholly immaterial, in view of the fact that the plaintiff did not die, but lived to reclaim the property.

ID.—EVIDENCE—DANGER OF DEATH OF PLAINTIFF—LEADING QUESTIONS

—DISCRETION.—The allowance of leading questions to the physician who attended the plaintiff during his illness, as to the danger of his death at the date when the deposits were transferred and the deed executed, was in the discretion of the trial court; and a judgment for the plaintiff will not be reversed upon that ground, there being no manifest abuse of discretion, and no error in regard to a material matter affecting the substantial rights of the parties.

ID.—RES GESTAE—INTERVIEW WITH BUSINESS MANAGER.—Evidence is admissible as part of the *res gestae*, to show that the plaintiff, when ill and not expected to live, sent for his business manager, and interviewed him, stating that he wished to make a will in favor of his sister, the defendant, and subsequently stated that he had concluded to make a deed, and informed the manager of what he wanted his sister to do with the property in case he should die.

ID.—MOTIVES AND INTENTIONS OF PLAINTIFF—DECLARATIONS—TESTIMONY OF PLAINTIFF.—The issue being as to whether the alleged transfers were made without consideration in expectation of immediate death, plaintiff's belief that death was impending, and his motives and intentions in making the transfers, were material to the issue, and his declarations then made, showing his belief, motives, and intentions then were, are competent evidence.

DEPOSITION—LEADING QUESTIONS—WAIVER OF OBJECTION.—Where both parties were present at the taking of a deposition, the objection that questions were leading must be taken at the time of the interrogatory, and if no objection was then made to the form of the interrogatory, it cannot be urged at the trial.

ID.—POWER OF NOTARY TO EMPLOY SHORTHAND REPORTER—TRANSCRIPT OF TESTIMONY—CERTIFICATE.—The notary taking a deposition may either appoint a clerk or a shorthand reporter to take down the testimony; and the fact that such reporter was not appointed by the court, and that his transcript of the testimony into longhand was objected to by defendant's counsel, is immaterial, if the certificate of the notary states that the transcription into longhand was by the notary carefully read to the witness, and, being by him first corrected, was subscribed by the witness in the presence of the notary.

NEW TRIAL—STATEMENT—SPECIFICATIONS—INSUFFICIENCY OF EVIDENCE.—Specifications in a statement on motion for new trial of the insufficiency of the evidence to justify the findings, must state the particulars in which the evidence is claimed to be insufficient, and a mere general statement that the evidence is insufficient to justify a finding should be disregarded.

APPEAL—ARGUMENT—POINTS NOT URGED IN BRIEF.—Where the appellant does not point out in his brief any particular issue or issues upon which the court omitted to find, or what particular finding or

findings were unsupported by evidence, and the particulars in which they were unsupported, it is not the duty of the appellate court to investigate those questions.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. J. C. B. Hebbard, Judge.

The facts are stated in the opinion.

F. J. Castelhun, for Appellant.

James H. McKnight, and Charles L. Patton, for Respondents.

COOPER, C.—This action was brought by one Robert Bright to have it adjudged that the defendant holds the legal title to certain real estate, described in the complaint, in trust for plaintiff, and that defendant be required to execute and deliver to plaintiff a good and sufficient deed to said real estate, and also to recover certain moneys that are alleged to be the property of plaintiff, and held by defendant in trust for him. The facts, as shown by the record and found by the court, are in substance as follows: The original plaintiff, Robert Bright, and the defendant were brother and sister, and for many years prior to June 7, 1895, they had lived together in the same house and on the most friendly and confidential relations. The plaintiff was then about seventy-eight years old and the defendant about seventy-six. About the 31st of May, 1895, the original plaintiff was afflicted with a severe stroke of paralysis and became so ill that on the seventh day of June following he was in danger and expectation of immediate death, and while in such condition he assigned to defendant deposits amounting to about seventeen thousand dollars in certain savings banks, and also executed and acknowledged a deed to defendant of certain real estate in the city and county of San Francisco particularly described in the complaint. The assignment and deed were made with the understanding that defendant should, after the death of the original plaintiff, dispose of the property according to certain instructions given to defendant by said

plaintiff. The deed was never delivered to defendant, but was placed in a drawer of a table in a room then occupied by said plaintiff, and afterward, without the knowledge or consent of said plaintiff, defendant took the deed from the said drawer, and on January 7, 1896, placed the same of record with the county recorder of the city and county of San Francisco. There was no consideration for the said deed or the transfer of said bank accounts. After the ninth day of June, 1895, the plaintiff ceased to be in danger of immediate death, and afterward he demanded of defendant that she deed, assign, and transfer the said property back to plaintiff, all of which she refused to do. She not only refused to reconvey the property, but claimed to be the owner of it and seised in fee of the real estate. The plaintiff, on the second day of March, 1897, and before the trial of this case, died, and on the eighth day of March, 1897, the present plaintiffs, as special administrators of his estate, were substituted, and plaintiffs are now the executors of the last will and testament of the original plaintiff. After the date of the transfers of said real and personal property, and prior to the death of the original plaintiff, defendant had laid out and expended two thousand dollars for taxes, insurance, nursing of plaintiff, et cetera. Upon these facts the court below deducted two thousand dollars from the amount of the said deposits, and gave judgment against defendant for the balance, and that the defendant has no right, title, or interest in said real estate, and that defendant deliver up the said deed to be canceled and be enjoined from setting up any claim to the lands therein described. A motion was made for a new trial, which was denied, and this appeal by defendant is from the judgment and order. The record is quite voluminous, and counsel for appellant has filed a brief of thirty-four printed pages. Counsel for plaintiff have not seen fit to file a reply, and thus the full labor of investigating all the questions raised in appellant's brief is thrown upon this court with no assistance from plaintiff's counsel.

Defendant's counsel urges that the demurrer to the amended complaint should have been sustained upon several different grounds. The complaint sets forth what is claimed to be the facts in two counts, the first count being in regard

to the real estate and the second count in regard to the deposits in the bank. The main facts are set forth by the pleader "as having occurred June 7, 1895, as a part of the same transaction." The principal ground of demurrer and the one first urged, is "that said complaint sets up two counts for one cause of action." This is not one of the grounds of demurrer laid down in the code (Code Civ. Proc., sec. 430), and no others can be considered. (*Hentch v. Porter*, 10 Cal. 558; *Bernero v. South Bend etc. Co.*, 65 Cal. 386.) The cases cited in appellant's brief relate to where a single act or transaction is made the subject of separate actions. Here we have only one action in regard to one transaction, although the same is set forth in two separate counts. The counts might be both considered together as a narration of the facts upon which plaintiff relies for a recovery. If the facts are fully set out, although given in what the pleader calls separate counts, each numbered into separate paragraphs, it can make no difference and cannot injure or prejudice the defendants in any way. It is next claimed that the first count does not state a cause of action because it is an attempt to have the court declare a transaction in regard to real property to have been *donatio causa mortis*, and that a gift in view of death applies to personal property only.

The answer to this is that the pleader states that the deed was without consideration and was never delivered to defendant. If a grantee named in a deed, to whom the deed was never delivered, and for which there was no consideration, wrongly gets possession of the deed and places it upon record, and then claims to own the property therein described, it seems to us that the grantor, upon stating and proving these facts, would be entitled to relief. The point is further urged that the complaint is uncertain and ambiguous in that it avers that the defendant would dispose of the real and personal property in accordance with certain written instructions, and that the same are not set out and it is impossible to determine what they were. The complaint sets forth that as the transfers were made in view of immediate death, that defendant was to carry out certain written instructions in case plaintiff should die. As the plaintiff did not die, but lived to claim his property, and as the gist of

the action is to compel a reconveyance, the written instructions are immaterial. There is no claim that any written instructions should be enforced, and no claim as to anything caused by the want of such instructions being carried out. We think the demurrer was properly overruled. For the reasons given in regard to ruling upon the demurrer it was not error for the court to refuse to compel the plaintiff to proceed upon one count only of his complaint. It is claimed that the court committed many errors in overruling defendant's objections to testimony. There are eighty-seven of these assignments of errors in the transcript, argued under twenty-seven different assignments in appellant's brief. In the first assignment it is said that the court erred in overruling the defendant's objections to three questions asked of the witness, Dr. Mays. The witness had attended Robert Bright more or less for five years. He was called in to see him professionally about May 21, 1895, and attended him about twice a day until June 17th. The questions were then asked of the witness:

"Q. Did you find him in the same condition during that time?" The witness answered: "His condition varied, improving slightly after a few months; during the first week following the 30th of May his condition became worse."

"Q. As a matter of fact, doctor, was Robert Bright in danger of death at that time?" The witness in answer said: "There was considerable danger of death. For some time I thought death might ensue at any time." . . .

"Q. Did he take these opiates in sufficient quantities to impair his capacity?" The witness answered: "No, simply sufficient to allay the pain."

All these questions were objected to upon the sole ground that they were leading, and the objection overruled. This court would not reverse a case for error in the matter of admission of testimony unless the errors were in regard to a material matter affecting the substantial rights of the parties. (*Kiler v. Kimbal*, 10 Cal. 267.) It is a well-settled rule in this state that the allowance of leading questions is in the discretion of the trial court, and that a case will not be re-

versed on such ground unless there is a manifest abuse of discretion. (*White v. White*, 82 Cal. 452.)

We think, while the questions were leading, that there was not such an abuse of discretion as would warrant us in holding the rulings to be reversible error. One Capp had been for many years, and was on the 4th of June, 1895, the agent and business manager of the said Robert Bright. He was sent for by Bright on said day and for the purpose of having some disposition made of his property in case he should die. When called as a witness, after some preliminary questions, and after stating that in response to a call from a messenger he went to the house where Bright was staying, this question was asked: "Q. State what conversation you had with Mr. Bright on this occasion." The question was objected to upon the ground "that it was incompetent, irrelevant, and immaterial." The objection was overruled and exception taken. It is said that this ruling was error, for the reason that the conversation was not had in the presence of defendant, and that even if she had been present it was irrelevant and immaterial, and, further, that a deed cannot be invalidated by subsequent declarations of the grantor. We think the evidence was relevant and material as a part of the *res gestae*. The witness had been called upon to make certain arrangements about Bright's property in case he should die. It seems Bright wanted to make a will and at first talked about that, but afterward concluded to make a deed to his sister, and gave the witness a statement of what he wanted his sister to do with the property in case he should die. It was alleged in the complaint that the transfers were made without consideration and in expectation of immediate death. The answer took issue upon this. It was, therefore, necessary to inquire fully into the acts done by Robert Bright, and his motives and intentions. The very question to be determined was as to whether or not the transfers were made with a belief on the part of Robert Bright that he was nearing the presence of the monster, Death. The testimony was not as to what Bright said after the transfers, but what he said before he made them, and as a part of what was to be done.

Where it is necessary to inquire into the motive of a particular act, and the intention of the person who did the act,

proof of what the person said at the time of doing it is admissible in evidence for the purpose of showing its true character. (1 Greenleaf on Evidence, sec. 108; 1 Rice on Evidence, sec. 211b; 1 Phillips on Evidence, 233.) In the case of *Lund v. Tyngsborough*, 9 Cush, 43 the court, in a very learned and exhaustive review of the law as to the admissibility of hearsay evidence, said: "Perhaps the most common and largest class of cases in which declarations are admissible is that in which the state of mind or motive with which any particular act is done is the subject of inquiry," and after discussing the many rules and exceptions laid down the rule. "When the act of a party may be given in evidence, his declarations, made at the time, and calculated to elucidate and explain the character and quality of the act, and so connected with it as to constitute one transaction, and so as to derive credit from the act itself, are admissible in evidence. The credit which the act or fact gives to the accompanying declarations as a part of the transaction, and the tendency of the contemporary declarations as part of the transaction to explain the particular fact, distinguish this class of declarations from mere hearsay."

It is earnestly contended that the court erred in allowing Bright to testify, under the objections of defendant, as to his intentions when he executed the deed and transfers of property to defendant. We think the testimony was competent and material. The intentions and motives of Bright were he material matters being investigated. In such cases the universal rule is to receive the witness' testimony as to his intentions. (Wharton on Evidence, secs. 482, 508, 955; *Snow v. Paine*, 114 Mass. 526; *Barnhart v. Fulkerth*, 93 Cal. 499.) The objections and exceptions in the transcript from the seventh to the eighty-seventh, inclusive, are to questions asked in the deposition of the plaintiff, which was admitted and read in evidence. A large number of questions are objected to upon the ground that they are leading. It does not appear from the record whether or not the objections were made at the time of taking the deposition, but it does appear that counsel for defendant attended, at the examination. The code (Code Civ. Proc., sec. 2032) lays down the rule that in taking a deposition, if the parties attended at

the examination, no objection to the form of an interrogatory shall be made at the trial unless the same was stated at the time of the examination.

We have examined all the assignments as to errors in receiving testimony under the objections of defendant, and we do not find any one of sufficient importance that we think we would be justified in holding the rule prejudicial error.

The deposition of Robert Bright was offered in evidence, and counsel for defendant objected to it being read upon the ground "that it was taken in shorthand by a shorthand reporter not appointed by the court, and transcribed into longhand by such reporter against the objections of defendant's counsel made at the time." The court below asked counsel for defendant if there was any claim that the deposition was not correctly transcribed, and counsel said: "That as to that he could not say." The certificate of the notary shows that when the deposition was transcribed into longhand it was by the notary carefully read to the witness, and, being by him first corrected, was subscribed by the witness in the absence of the notary. It is claimed that the words of the witness must be written down by the notary unless the parties agreed upon a different mode. (Citing Code Civ. Proc., sec. 2006.)

Counsel says in his brief: "It is not claimed that the notary might not have employed a clerk to write down the questions and answers with a pen or machine, but it was improper to employ the sister of counsel for plaintiff." It does not appear, except in the brief of counsel, that the sister of counsel for plaintiff was employed as shorthand reporter. If the notary could employ a clerk to write down the questions and answers with a machine, we fail to see why a reporter could not take down the questions and answers. When a witness gives an answer and it is written out in longhand, it could not be a valid objection that the answer remained in the memory of the writer until he committed it to paper. But clearly when an answer is given by a witness it remains with the person writing and in his memory until it is transferred to paper. If the writer should take it down in characters only known to himself, and thus preserve the memorandum of each question and answer until he aft-

erward had time to write it down in longhand, we fail to see why when finally transferred to longhand, it is not written down as completely as if done as the words fell one by one from the lips of the witness. We think the code clearly contemplates this course. (Code Civ. Proc., sec. 2038.) The language is, "Upon the appearance of the witness the judge or justice must cause his testimony to be taken in writing," et cetera. It is also provided that the deposition, when completed, must be carefully read to the witness and corrected if desired and then subscribed by him. This makes the reading, correcting, and signing the necessary and material thing to be done, and it was done in this case. The object of requiring the witness to sign the deposition is to make him responsible for its phraseology, for by signing he adopts the language as his own. (Weeks on Law of Depositions, sec. 321.) It is claimed that the court failed to find on some of the material issues. Our attention is not called to any material issue upon which there is no finding, and as counsel has not seen fit to point out in his brief the particular issue or issues upon which there should have been a finding, it cannot be expected that we will go through the record on an independent voyage of discovery.

Defendant's counsel assigns some fifteen errors in which he claims the evidence is insufficient to justify the findings. The only specification wherein the evidence is alleged to be insufficient is, "The evidence is insufficient to justify," et cetera. Unless the particulars in which the evidence is said to be insufficient to justify any particular finding or part thereof are pointed out in the assignment of error, we cannot notice the assignments here. (Code Civ. Proc., sec. 659; *De Molera v. Martin*, 120 Cal. 544.)

And even if the specifications in the assignments of error were sufficient, counsel has not pointed out in his brief and called our attention to the particular finding or findings claimed to have no support in the evidence, and the particulars in which such finding is not supported by the evidence. In such case we do not deem it our duty to investigate the questions as to the insufficiency of the evidence.

We advise that the judgment and order be affirmed.

Chipman, C., and Britt, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are affirmed.

Harrison, J., Garoutte, J., Van Dyke, J.

Hearing in Bank denied.

[S. F. No. 1151. Department Two.—June 17, 1899.]

J. S. REID, Respondent, v. F. W. KRELING'S SONS' COMPANY, Appellant.

PARTNERSHIP—INCORPORATION OF FIRM—ACTION FOR GOODS SOLD AND DELIVERED—NOTICE.—A corporation formed by members of a partnership firm, which took its assets, and continued to pay its debts, and to conduct the business as formerly, using its books, and continuing and extending the various accounts therein without break, is liable in an action for goods sold and delivered in the name of the firm by a former customer, who had no knowledge or notice of the incorporation until shortly before the commencement of the action, where it appears that the goods and bills therefor were received by the corporation, and the amounts thereof entered upon the books by it, and payments thereupon made by it without objection.

ID.—DEFENSE—ESTOPPEL OF CORPORATION.—The corporation, under the circumstances, is estopped from setting up a defense to such action, founded upon the change made from a copartnership to a corporation.

ID.—USE OF GOODS BY INDIVIDUALS.—The fact that a small part of the goods sold were used by some of the individual members of the original firm in improving certain real property is immaterial, the goods having been ordered and sold and entered upon the books of both parties in the usual manner.

ID.—APPLICATION OF PAYMENTS.—Payments made by the corporation upon the running account of the plaintiff with the firm were properly applied to indebtedness on the account that had accrued prior to the date of the incorporation of the firm.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. James M. Troutt, Judge.

The facts are stated in the opinion of the court.

Thomas A. McGowan, for Appellant.

Charles Wesley Reed, for Respondent.

McFARLAND, J.—Action to recover one thousand and sixty-four dollars and forty-four cents for goods sold defend-

ant by the San Francisco Novelty Plating Works (a corporation), which assigned its claim therefor to plaintiff. The court below gave judgment to plaintiff for the amount sued for, and defendant appeals from the judgment and from an order denying a motion for a new trial.

We see no reason for disturbing the judgment, which is clearly a just one. There is no question about the amount of the goods furnished, or the actual balance due thereon; the whole defense is upon the ground that the members of a copartnership, which had been dealing with the respondent's assignor, changed the copartnership into a corporation and continued to deal with said assignor as before, without his knowledge that such change had been made.

For many years prior to the year 1894 "F. W. Kreling & Sons" had been carrying on a certain business as copartners, and prior to and during the year 1894 they had a running account with plaintiff's assignor. Sometime in 1894 they concluded to continue their business under the form of a corporation instead of a partnership; and for that purpose formed a corporation called "F. W. Kreling's Sons' Company." It seems that they considered themselves a corporation in April, 1894, at which time they signed certain papers relating to the proposed change, and commenced at that time to conduct their business in the corporate name; but articles of incorporation were not filed until September 1st, and a certificate of the incorporation was not issued by the secretary of state until October 5th. But no matter at what time they assumed to change, or did legally change, from a partnership to a corporation, plaintiff's assignor had no notice of the change until a short time before the commencement of this action, and continued as usual, to send them goods, and sent bills in which "F. W. Kreling & Sons" were named as purchasers and debtors; and these goods and bills were received by appellant, and their amounts entered on its own books, and payments were made from time to time to plaintiff's assignor, without any objection whatever, and without any notification to him that what was formerly a partnership had become a corporation with substantially the same name. The corporation took the assets of the copartnership, and, as the evidence shows, continued to pay the

debts of the latter and to conduct the business just as before; indeed, the corporation used the very books which had been used by the copartnership, and continued and extended therein the various running accounts without break. Under these circumstances, the appellant is estopped from setting up a defense founded upon the change from a copartnership to a corporation, as against the cause of action here sued on. The fact that a small part of the goods were used by some of the Krelings individually, in moving certain real property, makes no difference; they were ordered and sold in the same manner as the other goods, and in like manner were credited and entered in the books of both parties; and, under the above views, payments made by appellant after September 1st were properly applied to indebtedness on the running account that had accrued before that time.

The judgment and order appealed from are affirmed.

Temple, J., and Henshaw, J., concurred.

[S. F. No. 1012. Department Two.—June 17, 1899.]

F. BERKA, Respondent, v. J. G. WOODWARD, Treasurer of the City of Santa Rosa, Appellant.

MUNICIPAL CORPORATIONS—ILLEGAL CONTRACT BY MEMBER OF COUNCIL—IMPLIED CONTRACT PROHIBITED.—The provisions of a city charter and of the Political Code forbidding a member of the city council to be directly or indirectly interested in any contract made by the council, and of the Penal Code providing a penalty therefor, apply both to express and implied contracts; and a member of such council who has expressly contracted with it for the sale of lumber and materials to the city, cannot recover their value upon an implied contract.

ID.—RECOVERY UPON IMPLIED CONTRACT, WHEN PERMISSIBLE.—It is only where contracts of public officers with their counties or municipalities have not been expressly forbidden by law, and are not *malum in se*, but are merely considered contrary to public policy, that the offer is allowed to recover upon an implied contract, upon a *quantum meruit* or *quantum valebat*. But no recovery of any kind can be had where the contract is either *malum in se*, or expressly prohibited.

ID.—EFFECT OF PENALTY—ILLEGAL CONTRACT.—Where a statute pronounces a penalty for an act, a contract founded upon such act

is void, even though the statute does not pronounce it void nor expressly prohibit it.

ID.—ALLOWANCE OF CLAIM BY COUNCIL.—DUTY OF TREASURER.—MANDAMUS.—The allowance of a claim by the city council for the value of lumber and materials sold to the city by a member of the council does not give the claim a validity not otherwise possessed. It is the duty of the treasurer to pay only legal demands against his funds; and he cannot be compelled by *mandamus* to pay such claim.

APPEAL from a judgment of the Superior Court of Sonoma County. S. K. Dougherty, Judge.

The facts are stated in the opinion of the court.

O. O. Webber, City Attorney, and J. Leppo, for Appellant.

The contracts upon which the warrants were based were illegal and void, and no recovery could be had thereunder (Stats. 1875-76, pp. 255, 256; Pol. Code, secs. 920, 921; Pen. Code, sec. 71; Civ. Code, secs. 1607, 1608, 1667; *Fowler v. Scully*, 72 Pa. St. 456; 13 Am. Rep. 708; *Brooks v. Cooper*, 50 N. J. Eq. 761; 35 Am. St. Rep. 801, 802; *Swanger v. Mayberry*, 59 Cal. 93, 94; *Santa Clara Mill etc. Co. v. Hayes*, 76 Cal. 390; 1 Am. St. Rep. 211; *Gardner v. Tatum*, 81 Cal. 373; *Morrill v. Nightingale*, 93 Cal. 458; *Visalia etc. Co. v. Sims*, 104 Cal. 332; 43 Am. St. Rep. 105; *Wyman v. Moore*, 103 Cal. 214; *Capron v. Hitchcock*, 98 Cal. 430; *Alexander v. Johnson*, 144 Ind. 82; *Winchester etc. Light Co. v. Veal*, 145 Ind. 506; *Woods v. Armstrong*, 54 Ala. 150; 25 Am. Rep. 671.) In case of a municipal corporation there can be no waiver of the illegality of a contract therewith, by virtue of a public law. (Civ Code, sec. 3513; *Fowler v. Scully*, *supra*; *Mullan v. State*, 14 Cal. 587.)

D. R. Gale, and Campbell & Campbell, for Respondent.

Plaintiff had the right to recover upon an implied contract. The party receiving the benefit, though the contract was illegal, is held to accountability upon an implied promise to prevent a failure of justice. (*Concordia v. Hagerman*,

1 Kan. App. 35; *Gardner v. Butler*, 30 N. J. Eq. 702; *Spearman v. Texarcana*, 58 Ark. 348; *Pickett v. School Dist.*, 25 Wis. 551, 558; 3 Am. Rep. 105; *Call Pub. Co. v. Lincoln*, 29 Neb. 149; *Mayor v. Muzzy*, 33 Mich. 61; 20 Am. Rep. 670; *Mayor v. Huff*, 60 Ga. 221; *Marsh v. Fulton Co.*, 10 Wall. 676, 684; *Louisiana v. Wood*, 102 U. S. 294; *Pimental v. San Francisco*, 21 Cal. 362; *Swift v. Swift*, 46 Cal. 266; *McConoughey v. Jackson*, 101 Cal. 265; 40 Am. St. Rep. 53; *Capitol Gas Co. v. Young*, 109 Cal. 140; *Hitchcock v. Galveston*, 96 U. S. 350; *Chapman v. Douglass Co.*, 107 U. S. 356; *Crompton v. Zabriskie*, 101 U. S. 601; *Parkersburg v. Brown*, 106 U. S. 487; *Ashhurst's Appeal*, 60 Pa. St. 290.)

HENSHAW, J.—This is an appeal from a judgment in mandate ordering the treasurer of the city of Santa Rosa to honor and to pay two warrants issued in favor of plaintiff by the common council of the city. The warrants were in payment of lumber and materials “had and received by the city from Berka.” At the times when the material was supplied, at the times when Berka presented his bills and demands for payment, and at the time when the city council allowed and approved his claims, Berka was an officer of the city and a member of its common council. These facts appear by the petition. The defendant interposed a demurrer, both general and special. This demurrer was “overruled without leave to answer,” and a peremptory writ of mandate was ordered to be issued.

The question of first importance presented upon this appeal is that of the right of an officer of the city to recover upon an implied contract with the municipality. The following provisions of the law, and of the charter of the city of Santa Rosa (have direct bearing upon this consideration:

“No councilman to be directly or indirectly interested in any contract made by them, or in any pay for work done under their direction or supervision.” (Charter of Santa Rosa, Stats. 1875-76, p. 255.)

“All bills, claims, and demands against the city shall be . . . filed by the city clerk, who shall present it to the council, and they shall allow or reject the same in whole or in part.” (Charter of Santa Rosa, Stats. 1875-76, p. 251.)

“Members of the legislature, state, county, city and township officers must not be interested in any contract made by

them in their official capacity, or by anybody or board of which they are members." (Pol. Code, sec. 920.)

"State, county, township, and city officers must not be purchasers at any sale, nor vendors at any purchase made by them in their official capacity." (Pol. Code, sec. 921.)

"Every contract made in violation of any of the provisions of the two preceding sections may be avoided at the instance of any party except the officer interested therein." (Pol. Code, sec. 922.)

"Every officer or person prohibited by the laws of this state from making or being interested in contracts, or from becoming a vendor or purchaser at sales, or from purchasing script or other evidence of indebtedness, who violates any of the provisions of such laws, is punishable by a fine of not more than one thousand dollars, or by imprisonment in the state prison not more than five years, and is forever disqualified from any office in this state." (Pen. Code, sec. 71.)

"That is not lawful which is: 1. Contrary to an express provision of law; 2. Contrary to the policy of express law, though not expressly prohibited; or 3. Otherwise contrary to good morals." (Civ. Code, sec. 1667.)

"The consideration of a contract must be lawful within the meaning of section 1667." (Civ. Code, sec. 1607.)

"If any part of a single consideration for one or more objects, or of several considerations for a single object, is unlawful, the entire contract is void." (Civ. Code, sec. 1608.)

It would seem that the need of discussion is foreclosed by the mere quotation of our express laws, but respondent contends, and in his contention prevailed in the trial court, that these provisions have no application to an implied contract such as this admittedly is, and that in the case of implied contracts which are not *malum in se*, even though they may be against public policy, the rule is, that if the consideration has passed—if the contract upon the one hand has been wholly executed—the party who has so performed will be allowed a recovery upon *quantum meruit* or *quantum valebat*, as the case may be. The importance of this question, the right of an officer of the city to recover upon an implied contract with his municipality, its gravity and far-reaching consequence, demand something more than a passing consideration.

By subdivision 1 of section 1667 of the Civil Code reference is had to contracts expressly prohibited. (These will be

discussed hereafter. Within subdivisions 2 and 3 of the same section are embraced the multitude of contracts which, though not expressly prohibited, are refused recognition upon grounds of public policy. These contracts, in contemplation of their subject matter, may be divided into two distinct classes; the first where the consideration is base and against good morals, *malum in se*; the second, where the consideration is in itself lawful, but where the mode is unauthorized, or where, because of some fiduciary relation between the parties, the law will not permit the contract to be made, nor countenance it when made. As to the first it is said in *Blatchford v. Preston*, 8 Term Rep. 95: "A plaintiff cannot recover in a court of justice whose cause of action arises out of a contract between him and the defendant in fraud or to the prejudice of third persons." Of the second, Lord Mansfield and the court of King's bench, in *Jones v. Randall*, Cowp. 39, declared: "Many contracts which are not against morality are still void as being against the maxims of sound policy." The first class of contracts embraces the infinite number of those made to further crime, or to interfere with the administration of the law, or to obstruct the course of justice, all contracts affecting the rights and prerogatives of the government, as well as the personal rights of the citizen. In the second class no baseness is inherent in the assent of the contract, but there is either some defect in the mode of creation or the manner of performance, or some incapacity in one or the other of the parties because of nonage, mental disability, or the fiduciary relation which they sustain to each other. Within this second class, as has been said, are the contracts of one who stands in a fiduciary relation to another with that other. Because of the tendency to abuse, the temptation to take undue advantage, these contracts, even when not expressly prohibited by law, are still looked upon with disfavor, and they may be avoided at the instance of the other party in interest; but, where the trustee or other fiduciary agent has fully carried out the terms of the contract, the contract itself being fair, public policy, which is not punitive, is satisfied to leave the right of rescission to the other party. If he shall elect to rescind, he does so upon the equitable condition of restoring what he has received. If however,

he chooses to retain the consideration, he is not bound by the terms and conditions of the contract, but the courts permit an action to establish and to recover the reasonable value of the thing sold or the service rendered. Such, it may be said, is the general rule, but in this state the line has been more closely drawn. Such contracts are against public policy. Being against public policy, the making of them is not to be encouraged. But to permit a profit is thus to encourage them. Therefore, in this state, when a recovery is permitted, it is not for the reasonable or market value, which naturally includes within it the contemplation of a profit, but, when possible, the recovery is limited to the actual cost. (*Fox v. Hale etc. Min. Co.*, 108 Cal. 369.)

Where contracts of public officials, with their counties or municipalities, have not been expressly forbidden by law, the principles which we have been considering have in some cases been applied, and a recovery has been permitted. In these cases it has been said that the demands of public policy have been satisfied by allowing the officer to recover, not according to the terms of his contract, but upon a *quantum meruit* or *quantum valebat*. (*Spearman v. Texarcana*, 58 Ark. 348; *Pickett v. School Dist.*, 25 Wis. 551; 3 Am. Rep 105; *Concordia v. Hagaman*, 1 Kan. App. 35; *Gardner v. Butler*, 30 N. J. Eq. 702; *Call Pub. Co. v. Lincoln*, 29 Neb. 149; *Mayor etc. v. Huff*, 60 Ga. 221; *Currie v. School Dist.*, 35 Minn. 163; *Mayor etc. v. Muzzy*, 33 Mich. 61; 20 Am. Rep. 670.) But in no one of these cases, nor indeed in any case which has come under our observation, have the courts entertained any contract or any rights growing out of a contract, where either the consideration was base, or the contract was against the express prohibition of the law. Thus, in *Call Pub. Co. v. Lincoln*, *supra*, the publishing company had sued the city to recover for printing. Bushnell was a stockholder in the plaintiff company, and was chairman of the city council's committee on printing during the time of the publications in question; the court held that the statute of Nebraska prohibiting officers from being interested in any contract with their municipalities referred to express contracts, that the contract under consideration was an implied contract. It therefore concluded that the contract was not

one expressly prohibited by law, and proceeded to discuss and decide the question upon the grounds of public policy. In *Concordia v. Hagaman, supra*, the prohibitory statute was "an act to restrain state and county officers from speculating in their offices." The contract there was a contract made by Hagaman when he was a member of the city council for the printing of the ordinances of the city. The court conceded that no recovery could be had if the contract were one expressly prohibited by law, but determined that the legislature had *ex industria* excluded municipal officers, and had limited the operation of the law to state and county officers. That being so, the contract was left to be considered upon the grounds of public policy alone. And in discussing that question the court says: "In considering the question of illegality of the contract it is proper that a distinction be made between a contract which is illegal because its execution requires the performance of an immoral or unlawful act, or transgresses an express statutory prohibition, and one wherein the act to be performed is lawful, but the agreement is invalid because of the manner it was entered into, or because of incapacity to contract in either of the parties. . . . When the contract looks to the doing of a lawful act, but may be avoided by one of the parties to it because the other party at the time acted in a fiduciary capacity for the first, the rule is applied in order to avoid the possibility of reaping any undue advantage from the contract. When it has been executed, without objection, and actual benefits have been received under it, all parties acting in entire good faith, the law is maintained and the ends of justice subserved by disregarding those parts of the express agreement wherein advantage might have been taken, and allowing compensation merely for the reasonable value of the benefits received under it. Considerations of public policy do not require the doing of less than this. The defense of public policy has no element of punishment in it; nor is it allowed out of consideration for the defendant. It is upheld by the consideration which the law ever entertains for the protection of the public, and the settled policy of the courts to give no aid to the enforcement of contracts whose general tendency is injurious to the public. Hence, the courts refuse all relief to one who

asks compensation for the doing of an act which is conclusively presumed to be hurtful to public interests or morals. When, however, the thing accomplished is proper and beneficial, and not placed under the ban of any penal prohibitory enactment, the reason for the rule fails, and it should not be applied any further than is necessary for the public good."

This, then, is the undoubted rule, that when a contract is expressly prohibited by law, no court of justice will entertain an action upon it, or upon any asserted rights growing out of it. And the reason is apparent, for to permit this would be for the law to aid in its own undoing. Says the supreme court of the United States in *Bank of United States v. Owens*, 2 Pet. 527: "No court of justice can in its nature be made the handmaid of iniquity. Courts are instituted to carry into effect the laws of the country. How can they become auxiliary to the consummation of violations of law? There can be no civil right where there can be no legal remedy, and there can be no legal remedy for that which is itself illegal." And again the same august tribunal, in *Coppel v. Hall*, 7 Wall. 542, says: "Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection would be tainted with the vice of the original contract and void for the same reasons. Where the contamination reaches it destroys. The principle to be extracted from all the cases is that the law will not lend its support to a claim founded on its own violation." And in our own state it has been said (*Swanger v. Mayberry*, 59 Cal. 91.): "The general principle is well established that a contract founded on an illegal consideration, or which is made for the purpose of furthering any matter or thing prohibited by statute, or to aid or assist any party therein, is void. This rule applies to every contract which is founded on a transaction *malum in se*, or which is prohibited by a statute on the ground of public policy." Nor in such cases does it matter whether the contract has been partially or wholly performed, or whether the consideration has passed

or not. "The test," says Judge Duncan in *Swan v. Scott*, 11 Serg. & R. 164, "whether a demand connected with an illegal transaction is capable of being enforced at law, is whether the plaintiff requires the aid of the illegal transaction to establish his case. If the plaintiff cannot open his case without showing that he has broken the law, the court will not assist him, whatever his claim in justice may be upon the defendant." And this must be so, for, while as a matter of private justice between individuals it would be but fair that one under such an illegal contract should restore the consideration or should make the payment, the rights of the public are superior to any such private considerations, and the public's right is that the fountains of justice shall remain unpolluted; that no court shall lend its aid to a man who grounds his action upon an immoral or illegal act. Therefore, there is no place for equitable considerations, presumptions, or estoppels. (*Fowler v. Scully*, 72 Pa. St. 456; 13 Am. Rep. 699.) *Ex turpi causa non oritur actio*. Whenever such a contract comes before the court the action must fail, and the parties will be left in the situation in which they may be found. Some slight attempt will be found occasionally to evade the application of this well-settled doctrine upon the ground of the hardship which sometimes results, but in no case, we think, has the existence of the rule been denied, or its justice as a matter commanding public necessity been questioned.

The rule, further, is that where a statute pronounces a penalty for an act, a contract founded on such act is void, although the statute does not pronounce it void, nor expressly prohibit it. (*Swanger v. Mayberry*, *supra*; *Santa Clara Mill etc. Co. v. Hayes*, 76 Cal. 390; 9 Am. St. Rep. 211; *Gardner v. Tatum*, 81 Cal. 370; *Morrill v. Nightingale*, 93 Cal. 458; *Wyman v. Moore*, 103 Cal. 214; *Visalia etc. Co. v. Sims*, 104 Cal. 332; 43 Am. St. Rep. 105; *Woods v. Armstrong*, 54 Ala. 150; 25 Am. Rep. 671; *Fowler v. Scully*, *supra*; *Seidenbender v. Charles*, 4 Serg. & R. 151; 8 Am. Dec. 682; *Brooks v. Cooper*, 50 N. J. Eq. 761; 35 Am. St. Rep. 793.)

Applying these principles to the contract before us, it is most manifest that it is not only against the express prohibition of the law, but that the law makes penal upon the part of a public officer the entering into it. We can yield no assent to the contention that our laws apply only to express

contracts. The statute itself is general in its terms. Both in the charter provision above quoted, and in section 920 of the Political Code, these officers are forbidden to be interested in "any contract" made by them. The only difference between an express contract and an implied contract is that in the former all of the terms and conditions are expressed between the parties; in the latter some one or more of the terms and conditions are implied by law from the conduct of the parties. Generally, express contracts with a municipality are made under the system of competitive bidding. Usually, this is made compulsory by law. To say that implied contracts were not prohibited would be to destroy the purpose and efficiency of the laws, and leave the people at the mercy of careless or unscrupulous officers. The case of *Smith v. Albany*, 61 N. Y., 444, is very similar to the one at bar. The council of the city, of which plaintiff was a member, appropriated two thousand five hundred dollars for defraying expenses of a Fourth of July celebration. Upon the day plaintiff furnished horses and vehicles for use in the celebration, and the fair value of their use was the sum of one hundred and thirty-nine dollars. The New York statute made it unlawful for a member of any common council to become a contractor under any contract authorized by the common council and authorized such contracts to be declared void at the instance of the city. Here was an implied contract, but it was one prohibited by the statute law as well as by considerations of public policy, and the plaintiff was denied any recovery. Our statutes are general in prohibiting any officer from being interested in such contracts, and, if ever there was an occasion for its strict enforcement, it certainly exists in a case such as this where the contractor is a member of the common council, whose duty it is to make such contracts on behalf of the city. He cannot be permitted to place himself in any situation where his personal interest will conflict with the faithful performance of his duty as trustee, and it matters not how fair upon the face of it the contract may be, the law will not suffer him to occupy a position so equivocal and so fraught with temptation. Note the illustration here presented. This material was obtained

from a member of the city council, and he as a member of that council sits in judgment upon the validity and amount of his own claim. If he does not act, still the city is deprived of its right to his services and knowledge in determining these very questions.

The fact that the claim was allowed by the council does not give to it a validity which it otherwise did not possess. (*Santa Cruz Rock P. Co. v. Broderick*, 113 Cal. 628.) The duty of the treasurer is to pay only legal demands against his funds. The law will not imply a promise to pay for services illegally rendered under a contract expressly prohibited by law. (*Gardner v. Tatum*, *supra*.)

For the foregoing reasons the judgment is reversed, with directions to the trial court to sustain the general demurrer to plaintiff's complaint.

Temple, J., and McFarland, J., concurred.

[Crim. No. 489. In Bank.—June 17, 1899.]

THE PEOPLE, Respondent, v. FRANK D. CRANDALL,
Appellant.

CRIMINAL LAW—HOMICIDE—EVIDENCE—MARKED PHOTOGRAPHS—DISCRETION.—Upon the trial of a defendant accused of murder, the use in evidence of photographs of the scene of the homicide, taken by the prosecuting officers, with certain places marked thereon as pointed out by witnesses, is within the discretion of the court.

ID.—PHOTOGRAPHS AS DIAGRAMS—HEARSAY—PROOF OF CORRECTNESS.—Like any other diagrams, the value of the photographs must be determined by the jury from all the evidence; and they are not inadmissible hearsay merely because the places marked were pointed out by witnesses, if they testify that they were correctly pointed out, and the correctness of the marking is proved.

ID.—PHOTOGRAPHS TAKEN BY PROSECUTION—UNSEEMLY TESTIMONY.—Although it may not be erroneous to permit the use as diagrams of photographs taken by the prosecuting officers, yet, their office being quasi judicial, it would be better if the proof were furnished by other witnesses. It is unseemly that the same person should be both advocate and witness.

ID.—IMPROPER IMPEACHMENT—CROSS-EXAMINATION AS TO IMMORAL CONDUCT.—Questions asked upon cross-examination of the wife of the defendant, for the avowed purpose of impeachment, as to whether she did not live by prostitution, and as to particular times and places, and particular men, and special modes of solicitation for immoral purposes, are highly improper; and the asking of them is prejudicial error as insinuating damaging charges against the witness tending to disgrace and degrade her.

CXXV. CAL.—2.

ID.—COLLATERAL INQUIRY—ANSWERS CONCLUSIVE—ARGUMENT OF DISTRICT ATTORNEY.—The inquiry as to the grossly immoral conduct of the defendant's wife, being wholly collateral to the issues, and the insinuated charges being such that they could not be rebutted otherwise than by the denial of the witness, her denials in answer to the improper questions are conclusive, and the prosecution could not contradict them; nor could the district attorney properly insinuate in argument to the jury that her answers to the questions were not true.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order denying a new trial. B. N. Smith, Judge.

The facts are stated in the opinion of the court.

W. H. Shinn, and Earl Rogers, for Appellant.

W. F. Fitzgerald, Attorney General, for Respondent.

VAN DYKE, J.—The defendant was tried upon a charge of murder and convicted of manslaughter. He appeals from the judgment and from an order refusing a new trial.

The homicide was committed at Ballona, on a lagoon near the beach, between Santa Monica and Redondo, in the county of Los Angeles. The only defense urged was that the life of the deceased was taken by the defendant in necessary self-defense.

Some two weeks prior to the homicide defendant rented from Hoagland a cabin having but one room, not far from the ocean beach and near the cottage occupied by Hoagland and his partner, who were fishermen. Soon after William White and Bowman—the deceased—joined Crandall at his request, and occupied the cabin with him. On the Sunday preceding the homicide they were joined by Mrs. Crandall, Mrs. Bowman, wife of deceased, and Maud Nelson, the mistress of White. The parties spent Sunday night at the cabin drinking. During the night a quarrel arose between Maud Nelson and Mrs. Crandall, into which Bowman and defendant were drawn. According to the testimony of the defendant and his wife, Maud Nelson asserted that defendant had made improper proposals to Mrs. Bowman, and, although Mrs. Bowman promptly denied the accusation, Bowman made some direful threats against defendant, and, as White sided with Bowman, defendant, who was an invalid, became

alarmed and left the cabin at about 2 o'clock in the morning; he and his wife went to Hoagland's cottage, where they spent the balance of the night. There they were told of other threats made by Bowman against the defendant. In the morning they rode with Hoagland on his fish wagon to Los Angeles, being afraid, as they testified, to remain at the beach. Nevertheless, defendant arranged to return and stop at the cottage with Hoagland, and took along some implements for baking clams, and also took with him a revolver. And on the following Tuesday he procured a buggy from a livery stable and returned to the beach with one Bremmerman. Then, having put up his horse, he and Bremmerman proceeded to the cabin to get some goods which Crandall had left. While collecting his things he inquired of White and Maud Nelson for Bowman, and was told where he was. Bowman was at the time lying down upon the sand, some three or four hundred yards distant, and Crandall and Bremmerman then proceeded toward him. Bowman, having seen them coming, got up and met them. When they met, Crandall asked Bowman for a pair of suspenders which he had loaned him. Bowman took them off and handed them to Crandall, and thanked him for their use. All three then turned and walked together toward the cabin. Bowman soon began to complain that Crandall had refused to be security for him for a small bill at Los Angeles, and charged him also with having insulted his wife. When Crandall denied this last charge Bowman suddenly turned upon him, put both hands upon his shoulders, and "glowering down at him," said: "You lie, you God damned son of a bitch. I will fix you." Crandall then asked Bowman to let him alone, and jerked away from his grasp, drew his pistol and shot him. Bremmerman was a witness for the prosecution and was the only person, other than the parties, who saw the affray, although there were several within hearing.

There was a difference as to the number of shots. Defendant testified, and in this he was corroborated by Bremmerman, that two shots were fired as rapidly as could be from a self-cocking pistol. Defendant claimed that both shots were fired while Bowman was standing over him; and Bremmer-

man testified that they were not more than two or three steps apart when the last shot was fired.

Other witnesses testified to four shots, and that defendant had admitted that he had fired four. Bowman turned to run as soon as possible after the firing commenced, and the prosecution contended that the fatal shot was fired while deceased was retreating, and while defendant stood upon a ridge of sand, and deceased was running down. The prosecution's theory was that the bullet entered at the back of the neck and passed downward toward the front, cutting the sub-clavical artery. The contention on the part of the defense was that the fatal bullet was fired from a point below, and before Bowman turned around to retreat; that it entered the breast near the armpit, and passed back and upward, coming out at the back of the neck.

The prosecution seemed to have had two theories; one that Crandall bought the pistol and went to the beach to assassinate Bowman, and the other that, even if the first shot was justifiable, the fatal shot was fired after Bowman had, to the knowledge of the defendant, declined further controversy, and was retreating. Considering the verdict, the latter was probably the theory adopted by the jury, although it may have been a compromise verdict.

Defendant testified that he did not stand upon this ridge when he fired at the deceased, but that Bowman stood above and facing him, and, after the shots, passed over the ridge, falling about one hundred feet away from him. To these questions the evidence was mainly addressed.

There had been a previous trial, and, to make things plain, the two deputy district attorneys who prosecuted the case took a camera to the beach and had Bremmerman and Jacobs point out the localities to them, and took some photographs, which were introduced in evidence at the trial as diagrams. They marked upon the photographs where other witnesses said the dead body of Bowman was lying, and where such witnesses said defendant told them he stood when he shot Bowman. Such witnesses were sworn, and testified that they correctly pointed out such spots to said deputies, and the latter testified that the localities were correctly marked according to the information given to them, but

the diagrams were not verified by the other witnesses. These deputy district attorneys also testified as to what could be seen from the window in a cabin, to support the testimony of White, whose veracity had been attacked by other evidence to the effect that the scene of the conflict could not be seen from the window.

The defendant strenuously contends that the admission of the photographs and the testimony of the prosecuting officers was erroneous, chiefly on the ground that the evidence was hearsay, was manufactured by the prosecuting officers, and, as claimed by defendant, was a gross abuse of their semi-judicial positions, to the prejudice of the defendant.

The photographs were used only as diagrams, and, although more complete proofs of their correctness could well have been required, still it cannot be said the trial court abused its discretion in allowing them to be used. We may assume that every one now understands the limitations upon the use of the photograph. It presents but one point of view, and may sometimes make an unfair representation of the points at issue. Like any other diagram, its value must be determined by the jury, from all the evidence. The evidence was no more hearsay than any evidence of a surveyor who makes a diagram to illustrate some theory of a case. Its value depends upon other evidence.

The evidence was, in a sense, manufactured by the prosecution, but not in an offensive sense. Tests are sometimes made and proven to settle certain disputed possibilities. We are not prepared to say it was error to allow them to be made by the prosecuting officers, although, as a rule, since their office is *quasi* judicial, it would have been better had the proof been furnished by other witnesses. That the same person should be both advocate and witness is unseemly, and shocks our sense of propriety.

There is no application of the recent decision in *People v. Hill*, 123 Cal. 571, to this case.

The defendant's wife was called as a witness and gave important evidence in his behalf. On cross-examination, for the avowed purpose of impeaching her, the district attorney, against continuous objection and protest on the part of the defendant, was allowed to ask a series of questions which, if

answered affirmatively, would disgrace and degrade the witness. They were all wholly collateral and outside the issues in the case, and did not refer to the relation of the witness to the parties, to the subject of the action or to the previous testimony of the witness. The asking of the questions implied, at least, an assertion of a belief on the part of the attorney that the witness had been guilty of gross immorality. It is charged by the defense that the questions were not asked for the purpose of getting before the jury the testimony of the witness upon the subject of investigation, but to insinuate damaging charges against the witness, which, by the rules of evidence, neither the witness nor the party could rebut, save by the denials of the witness, whose credibility was affected by the insinuations. That this charge was well founded is proven beyond cavil by the record. She was asked by a great variety of questions if she did not live by prostitution. She was questioned in reference to particular times and places, and to particular men, and as to whether she did not practice special modes of solicitation for immoral purposes. To all these questions the witness answered in the negative.

The defendant's contention, that by the decisions in this state this line of cross-examination is not allowable, is correct.

Section 2051 of the Code of Civil Procedure says: "A witness may be impeached, by the party against whom he was called, by contradictory evidence, or by evidence that his general reputation for truth, honesty or integrity is bad, but not by evidence of particular wrongful acts, except that it may be shown by the examination of the witness, or the record of the judgment, that he had been convicted of a felony."

In other states there is apparently a conflict of decisions upon the subject. (See *Carroll v. State*, 32 Tex. Crim. App. 431, 40 Am. St. Rep. 786, where the matter is discussed, and the cases cited.)

But while there is a controversy as to whether such questions can be permitted, there is no difference in holding that when allowed the answer of the witness must be accepted as conclusive. In asking such questions the questioner takes that risk, and justly so, because under the rules of evidence no other witness can be allowed to testify upon the subject. Neither the witness whose character is assailed, nor the party

the value of whose evidence is sought to be discredited, can sustain the witness on those points by other witnesses. The only evidence, therefore, which is allowed must be conclusive, and should be taken in good faith as true. This court has held in a number of cases that the answer of the witness to this class of questions must be taken as final and conclusive, and its truthfulness beyond all attack by independent evidence, and it has further been repeatedly held that such collateral matters cannot be gone into, even upon cross-examination. Section 2051 of the Code of Civil Procedure expressly forbids the impeachment of a witness "by evidence of particular wrongful acts." (*People v. Hamblin*, 68 Cal. 101; *People v. O'Brien*, 96 Cal. 180; *People v. Un Dong*, 106 Cal. 88; *People v. Wells*, 100 Cal. 462; *People v. Silva*, 121 Cal. 668; *Pyle v. Piercy*, 122 Cal. 383; *People v. Sharon*, 79 Cal. 673; *Estate of James*, 124, Cal. 653.) In *People v. Un Dong*, *supra*, the court say: "This whole course of examination by the prosecution was improper in the highest degree. The questions asked were not only in large part violative of defendant's rights to have his cross-examination confined to the subject matter of his testimony in chief (referring to former cases), but the obvious purpose and undoubted effect of such course of examination was to degrade the witness and prejudice the defendant in the estimation of the jury. Its allowance was, therefore, erroneous and clearly prejudicial. Nor was the error cured or the prejudicial effect removed by the negative answers to the questions allowed, or the sustaining of defendant's objection to others, where, as here, the manifest purpose and inevitable tendency of the questions was to injuriously affect the verdict. The error in such case lies in permitting an examination of that character. (*People v. Wells*, *supra*.)

In the case under consideration, after the prosecuting officers had gone out of their way in putting such questions, which were negatively answered, and which answers under all rules are made conclusive of the facts, they proceeded in their argument to insinuate to the jury that the answers were not true. This demonstrated conclusively that the purpose of asking the improper questions was to make insinuations against the character of the witness, and not to impeach her

testimony, and by this improper mode of procedure to prejudice the defendant. The attorney general argues that other testimony in the case tended to show that the witness belonged to a degraded class. If so, the district attorney should have relied upon such evidence, and should not, as he did, have voluntarily rebutted this theory by the answers of defendant's witness to his improper questions.

Judgment and order reversed and cause remanded for a new trial.

Garoutte, J., McFarland, and Harrison, J., concurred.

TEMPLE, J., concurring.—I concur in the judgment and in the opinion of Mr. Justice Van Dyke, except that I do not agree that questions irrelevant to the issues in a case, asked for the purpose of discrediting the witness, can never, in the discretion of the trial judge, be asked of a witness. It is said that sections 2051 and 2052 of the Code of Civil Procedure prohibit such evidence. In express terms these sections certainly do not. It is stated that a witness may be impeached: 1. By contradictory evidence; 2. By evidence that his general reputation for honesty and integrity is bad; and 3. By proving inconsistent statements.

Other modes of impeachment are not expressly prohibited, and ever since the existence of the statute other modes have been freely resorted to. Witnesses are constantly cross-examined as to their bias, or their interest in the case, their relationship to the parties, and also as to their occupation and position in the community; also as to what persons they have conversed with about the case; whether they have been paid to attend court, et cetera. These are all matters of impeachment, and none of them fall within the modes specified in the statute. The statute has, in fact, never been treated as prohibiting other usual modes of impeachment, and if it was intended that a witness could not be impeached except in the specified modes, there would have been no occasion for the one special negative "but not by evidence of particular wrongful acts."

As a general rule, the cross-examination should be confined to the subject matter of the direct examination, but this rule necessarily cannot apply to matters of impeachment. We

all agree that a witness cannot be asked questions merely for the purpose of degrading him, and while there has been much controversy as to admissibility of such evidence, no one contends that a party has an absolute right to indulge in such examination. It is not permissible to go into the former life of a witness and unnecessarily drag to light ancient scandals. The matter is almost entirely within the discretion of trial court, and such examination should be permitted only when and so far as it seems to be required for the ends of justice.

It is said that the earlier rulings were against allowing a cross-examination for the purpose of testing the character of the witness, and yet I find in a work as early as Roscoe's Criminal Evidence the following: "A witness may be questioned in cross-examination not only on the subject of inquiry, but upon any other subject, however remote, for the purpose of testing his character for credibility, his memory, or his accuracy The moment it appears that a question is being put which does not either bear upon the issue or enable the jury to judge of the value of the witness' testimony, it is the duty of the court to interfere as well to protect the witness from what becomes an injustice or an insult as to prevent the time of the court from being wasted."

Greenleaf states the rule pretty much in the same way. (1 Greenleaf on Evidence, sec. 459.) The question discussed by him, and which he says "has not yet been brought into direct solemn judgment," is, whether the witness is privileged and may decline to answer. He expressly states that the question may be asked, and sees no good reason for allowing a privilege to the witness.

Rice in his work on Evidence considers the question quite elaborately. He states the rule to be that: "Such questions should be allowed when there is reason to believe it may tend to promote the ends of justice; but they may be properly excluded when a disparaging course of examination seems unjust to the witness or uncalled for by the circumstances of the particular case." He cites the case of *Great Western etc. Co. v. Loomis*, 32 N. Y. 127, 88 Am. Dec. 311, where the discretion of the trial court is asserted, and in which are cited three cases tried by Lord Ellenborough, in one of

which, when a witness was asked if he had not been tried for theft, the court ordered the witness to answer and told him he would be sent to jail if he did not. In another he told the witness he could answer or not, as he pleased, but said if he were asked such a question he would refuse to answer. In the third the judge stopped the examination and would not permit the question to be answered, although no objection was made by anyone.

The author makes it plain that there has been no such discrepancy in the English cases as has been supposed. They are nearly all cases at *nisi prius*, and whichever way the court held it was within the rule which lodges the discretion in the trial judge. In the nature of the case no fixed rule for the exercise of the discretion can be laid down. In *White v. McLean*, 47 How. Pr. 193, is a full discussion of this subject, as also in *Carroll v. State*, 32 Tex. Crim. App. 431, 40 Am. St. Rep. 786, cited in the principal opinion.

In 1 Thompson on Trials, section 458, it is said that the better rule is that the trial court may allow, limit, or refuse such examination, and its ruling is not subject to review except in cases of manifest abuse (See, also, Taylor on Evidence, sec. 1314, *et seq.*)

In Stephens' Digest of the Law of Evidence it is said: "Where a witness is cross-examined he may be asked any question which tends: 1. To test his accuracy, veracity or credibility; or 2. To shake his credit by injuring his character. He may be compelled to answer any such question, however irrelevant to the fact in issue, and however disgraceful to himself, except where the answer might expose him to a criminal charge"—and under our statute, it may be added, where it tends to prove particular wrongful acts. In fact, except in this state, the rule is quite uniform that in the discretion of the trial court questions may be asked.

Nor do I admit that a different rule has been established here. Most of the cases cited have no bearing upon the general proposition. Of course, such examination is not allowable in every case. Where it is manifest, as in *People v. Wells*, 100 Cal. 462, and in *People v. Un Dong*, 106 Cal. 88, that the examination was not for the purpose of proving

the immorality, but to prejudice by insulting questions, it should not be tolerated and it would be error to permit it.

In *Pyle v. Piercy*, 122 Cal. 383, an attempt was made to prove upon cross-examination of a married woman that she had been too intimate with her husband before their marriage. The purpose of this examination may well have been held to be to insult the witness. This court simply said: "A witness cannot be impeached in this way." Upon the authorities, and upon principle I think, the trial judge may permit such examination when he deems that the ends of justice would be promoted by so doing; but, if he refuses, his discretion will rarely be interfered with.

Henshaw, J., and Beatty, C. J., concurred.

[S. F. No. 1138. Department Two.—June 19, 1899.]

CITY IMPROVEMENT COMPANY, Appellant, v. WILLIAM BRODERICK, Auditor, et cetera, Respondent.

STREET WORK IN SAN FRANCISCO—LANDS OF CITY—PRIVATE CONTRACT NOT AUTHORIZED.—The city of San Francisco has no power either under the consolidation act and amendments thereto, or under the Vrooman act, to make a private contract, without competitive bidding, for street work in front of the lands owned by it, the cost of which is chargeable against and payable out of the funds of the city.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. William R. Daingerfield, Judge.

The facts are stated in the opinion of the court.

J. C. Bates, for Appellant.

Garret W. McEnerney, for Respondent.

HENSHAW J.—Petitioner brought mandate against the respondent. A general demurrer was sustained to his petition, and he appeals from the judgment, thereafter entered. Petitioner did certain street work upon a street of the city and county of San Francisco, in front of Alamo square, the property of the city. The cost of this particular piece of work is chargeable against and payable out of the funds of the city. The contract, however, was awarded without competitive bidding. Upon this ground the auditor refused to

allow the demand, and it was upon this ground that the trial court sustained his general demurrer to the petition. The question involved is that of the power of the city and county of San Francisco to make a private contract, without competitive bidding, for street work in front of the lands owned by it.

The consolidation act of the city and county of San Francisco (Stats. 1856, p. 145) provided for the improvement of the public streets and highways of San Francisco. It made provision for the doing of street work by the municipality in front of the property owned by it, but it declared that such contracts should be let to the lowest bidder. (Stats. 1856, sec. 38, p. 156.) This provision was repealed by a later act. (Stats. 1871-72, p. 804.) This statute also contained the same provision requiring the contract of the municipality for the doing of this work to be let to the lowest bidder. In *Thomason v. Ashworth*, 73 Cal. 73, it was held that the general street law, the Vrooman act superseded the scheme provided for the city of San Francisco by the act of 1872. Under the decision in *Thomason v. Ashworth*, *supra*, either the whole of the act of 1872 was "struck dead," or only such portion of it as was in conflict with the provisions of the Vrooman act. If the later view be accepted, then the provisions of the act of 1872 requiring the city and county of San Francisco to let such contracts under competitive bidding is still in force and the judgment of the trial court was therefor properly given. If upon the other hand, the former view is to prevail, then one must look to the Vrooman act for the power of the municipality to let a contract of this kind, and herein it has been decided that no work can be done by the municipality under this law except under competitive bidding. (*Santa Cruz Rock P. Co. v. Broderick*, 113 Cal. 628.)

The judgment appealed from is therefore affirmed.

Temple, J., and McFarland, J., concurred.

Hearing in Bank denied.

[S. F. No. 822. Department Two.—June 19, 1899.]

MICHAEL JOSEPH DOOLIN et al., Appellants, v. OMNIBUS CABLE COMPANY, Respondent.

NEW TRIAL—CONDITIONAL ORDER—EXCESSIVE VERDICT—DAMAGES FOR NEGLIGENCE—CONFLICTING EVIDENCE.—In an action to recover damages for negligence, where the evidence was conflicting as to the extent of the injuries sustained at the time of the accident, which at that time appeared to be small, and as to whether distressing symptoms afterward manifested were or were not attributable to those injuries, the action of the trial court in conditionally granting a new trial for an excessive verdict of twenty thousand dollars' damages, unless plaintiff should remit fifteen thousand dollars therefrom, is not an abuse of discretion.

ID.—CONSTRUCTION OF CODE—"PASSION OR PREJUDICE"—INSUFFICIENCY OF EVIDENCE.—In the provision of subdivision 5 of section 657 of the Code of Civil Procedure, for the granting of a new trial for "excessive damages, appearing to have been given under the influence of passion or prejudice," the only means of discovering the element of "passion or prejudice" within the meaning of the statute is by comparing the amount with the evidence before the court at the trial; and that expression is but one mode of saying that the evidence is insufficient to justify the verdict for excessive damages.

ID.—REVIEW UPON APPEAL—CONFLICTING EVIDENCE—DISCRETION.—The review upon appeal of the action of the trial court in granting a new trial absolutely or conditionally for excessive damages, where there is a material conflict of evidence, will be governed by the same rule as to abuse of discretion, as if the ground of the order were insufficiency of the evidence to justify the verdict.

APPEAL from orders of the Superior Court of the City and County of San Francisco, granting a new trial conditionally and for failure to comply with the condition. A. A. Sanderson, Judge.

The facts are stated in the opinion.

Sullivan & Sullivan, for Appellants.

To justify a new trial for excessive damages, the verdict must be so grossly excessive as to indicate passion or prejudice of the jury, and to shock the moral sense. The jury are the

judges of the amount, and not the court. (Code Civ. Proc., sec. 657, subd. 5; *Aldrich v. Palmer*, 24 Cal. 513; *Wheaton v. North Beach etc. R. R. Co.*, 36 Cal. 590; *Wilson v. Fitch*, 41 Cal. 386; *Lee v. Southern Pac. R. R. Co.*, 101 Cal. 118; *Harris v. Zanone*, 93 Cal. 59; *Howland v. Oakland etc. Ry. Co.*, 110 Cal. 513; *Meeks v. St. Paul*, 64 Minn. 220; *Nelson v. West Duluth*, 55 Minn. 497; *Lucier v. Larose* (N. H.), 20 Atl. Rep. 249; *Hall v. Chicago etc. Ry. Co.*, 46 Minn. 439; *Western Union Tel. Co. v. Proesch*, 72 Tex. 654; 13 Am. St. Rep. 843; *Sheehy v. Kansas etc. Ry. Co.*, 94 Mo. 574; 4 Am. St. Rep. 393; *Solen v. Virginia etc. R. R. Co.*, 13 Nev. 106; *Louisville N. O. etc. R. R. Co. v. Thompson*, 64 Miss. 584; *Groves v. Rochester*, 39 Hun, 11; *Koetter v. Manhattan etc. Ry. Co.*, 59 Hun, 623; 13 N. Y. Supp. 458, 462, 463.)

W. H. L. Barnes, for Respondent.

There was no abuse of discretion in this case, under the evidence. The court had discretion to make the conditional order granting a new trial for excessive damages. (*Davis v. Southern Pac. Co.*, 98 Cal. 13, and numerous cases there cited; *Garoutte v. Haley*, 104 Cal. 497; *Brooks v. San Francisco etc. Ry. Co.*, 110 Cal. 173.)

BRITT, C.—Defendant, a street railway corporation, was engaged in the business of transporting passengers for hire on certain streets of the city of San Francisco. On November 17, 1891, the plaintiff, Mary J. Doolin, wife of Michael J. Doolin, who joins with her in this action, was a passenger on one of defendant's cars; the driver in charge thereof lost control of the horses by which the car was drawn and they pulled the car from the track and down an embankment; plaintiffs allege in their complaint that this was in consequence of the negligence of the defendant and its servant, the driver, and that thereby said Mary was violently thrown against the seat and floor of the car and sustained severe personal injuries for which they pray damages.

The trial of the action was commenced on September 25, 1893, and was concluded October 9, 1893. The evidence for plaintiffs tended to show that as the result of said accident Mrs. Doolin fell on the floor of the car and sustained, besides some minor hurts, a concussion of the spine which drew after it a train of evil consequences, such as great nervous debility, incompetence to walk without assistance, retention of urine, incoherence of speech, impaired vision, impaired memory, sleeplessness, hysterical and other effects, all of which, her counsel claim, "rendered her a physical wreck and seriously impaired her mind and memory." She appeared at the trial

as a witness on her own behalf. There was evidence for both sides that on May 8, 1893, an examination of Mrs. Doolin, with a view to ascertaining her physical and mental condition, was made by some medical gentlemen—three of them acting at the instance of the defendant, and three or four others on behalf of the plaintiffs. Several of them testified at the trial—both those for plaintiffs and those for defendant—that upon such examination they discovered that the patient had either a uterine or ovarian tumor—they differing as to its precise locality—which was then about the size of a cocoanut; and plaintiffs' family physician, who participated in such examination, testified that at time of trial such tumor had become about four times as large as it appeared to be when first discovered. Most of the medical witnesses expressed the opinion that concussion of the spine would not produce the tumor; though one of those called for plaintiffs stated that "it could have been produced by a shock to the patient in this way, that from the fact of a hemorrhage having followed from the blow a certain amount of fluid may have been thrown out into the intestines of the womb, and that may have become a nidus for a tumor."

For the defendant there was further evidence tending to show that the embankment down which the car was drawn was but slight and that the car was not overturned; that Mrs. Doolin was not thrown down; that she then exhibited no signs of injury; that she stated to several persons then and on the following day that she was not hurt but had been frightened and made a little nervous; and that the symptoms she subsequently manifested were those of hysteria or other ailments not dependent upon concussion of the spine—important among which was the tumor above mentioned.

There was a verdict for plaintiffs in the sum of twenty thousand dollars. Defendant moved for a new trial, upon the grounds, among others, that the damages are excessive, and appear to have been given under the influence of passion or prejudice; that the evidence is insufficient to justify the verdict; and newly-discovered evidence, material for defendant, which it could not with reasonable diligence have discovered and produced at the trial. At the hearing of the

motion it was a fact admitted on both sides that ten days after the trial, viz., on October 19, 1893, Mrs. Doolin gave birth to a child at full term, which, however, was stillborn, and that she had not been affected with a tumor at all. In an affidavit of Mrs. Doolin she stated that she did not know of her pregnancy until a day or two before the birth of the child; that until then she was advised by reputable physicians and believed that her symptoms in that particular were due to the presence of a tumor. The court made an order that unless plaintiffs remit the sum of fifteen thousand dollars from the judgment a new trial would be granted; the order concluding with the statement that it was made "on the sole ground that the verdict herein is excessive." Plaintiffs not complying with such condition, the court ordered finally that the motion for new trial be granted "on the sole ground that said verdict is excessive." This appeal is from both of said orders.

Plaintiffs contend that it is only when excessive damages appear "to have been given under the influence of passion or prejudice" (Code Civ. Proc., sec. 657, subd. 5), that the court can make such excess the ground for a new trial; and that in the present instance the evidence so clearly shows the verdict to have been intrinsically reasonable that the action of the court in requiring the plaintiffs to remit fifteen thousand dollars therefrom as the condition of denying a new trial was an abuse of discretion. So say that a verdict for damages was enhanced by passion or prejudice is one mode of saying that the evidence did not justify it; and the only means of discovering therein the element of passion or prejudice, within the meaning of the statute, is by comparing the amount with the evidence which was before the court at the trial. (*Harrison v. Sutter Street Ry. Co.*, 116 Cal. 156.) Whatever may be the rule which should govern the trial judge, it is certain that when his action in granting a new trial on the ground of excessive damages, or requiring a reduction of the amount as the condition of denying one, comes to be reviewed on appeal, his order will not be reversed unless it plainly appears that he abused his discretion; and the cases teach that when there is material conflict of evidence regard-

ing the extent of damage the imputation of such abuse is repelled, the same as if the ground of the order were insufficiency of the evidence to justify the verdict. The record of the case just cited from 116 California, shows that precisely the same practice was pursued there as in the present case; the court ordered that defendant's motion for a new trial be denied provided the plaintiff would consent to a reduction of his verdict from eight thousand dollars to four thousand dollars; plaintiff refused, and the rule was made absolute on the sole ground that the verdict was excessive; on appeal, the plaintiff urged the same objections that plaintiffs make here—that the record did not indicate passion or prejudice in the verdict of the jury, and that the trial judge had no proper control over it. But this court pointed out that there was evidence regarding the amount of damage upon which the views of men might differ, and said: "Every intendment is to be indulged here in support of the action of the court below, and it will not be disturbed if the question of its propriety be open to debate." Accordingly the order was affirmed. (See, further, *Townsend v. Briggs*, 88 Cal. 230; *Domico v. Casassa*, 101 Cal. 411; *Lee v. Southern Pac. R. R. Co.*, 101 Cal. 118; *Mills v. Oregon Ry. & Nav. Co.*, 102 Cal. 357.) Since in the case before us the court below saw the person injured and heard her testimony, since the evidence was conflicting concerning the extent of the injuries she sustained at the time of the accident, and whether the distressing symptoms which she afterward manifested were attributable to those injuries was in considerable measure a question of opinion upon which experts differed, it is plain that the case is not such that we can say the court was without data upon which to revise the verdict.

Plaintiffs say, however, that the opinions which assigned the cause of Mrs. Doolin's illness in any degree to the presence of a tumor in her genital organs are shown to have been mistaken. This is a fact, and as both sides rely on it to maintain their respective views touching the action of the court in requiring a reduction of the amount of the verdict, we are justified in considering it pertinent to that question,

although it was developed by affidavit to support the branch of defendant's motion assigned on newly-discovered evidence. But it must be remembered in this connection that some of the expert testimony for plaintiffs tended to attribute the supposed tumor itself to the shock of the accident. Since the time of Mr. Pope it has been often inquired, 'Who shall decide when doctors disagree?' The case at bar shows that gross error may lurk in their conclusions even when they have agreed; by which we mean no reflection upon the learned and very important profession of which the expert witnesses at the trial seem to have been respectable members, for all opinion evidence is from its nature fallible to a degree beyond that of most other kinds of evidence which the law deems competent. The evidence here for both parties having been so largely of that character, there seems to be on that account less reason for impugning the discretion which allowed a new trial. We cannot see that the orders appealed from were in an abuse of such discretion; they should therefore be affirmed.

Cooper, C., and Chipman, C., concurred.

For the reasons given in the foregoing opinion the orders appealed from are affirmed.

MacFarland, J., Temple, J., Henshaw, J.

Hearing in Bank denied.

[L. A. No. 405. In Bank.—June 19, 1899.]

SARAH J. KENNEY, Respondent, v. W. S. PARKS et al.,
Appellants.

DEED—DELIVERY TO THIRD PERSON—DEATH OF GRANTOR—CONTROL OF DEED.—In order to sustain the delivery of a deed to a third person, to be delivered to the grantee upon the death of the grantor, it must appear that the grantor parted with the possession and control of the deed for all time.

ID.—MUTUA. DEEDS OF HUSBAND AND WIFE—ESCROW—RETURN OF DEED OF SURVIVOR—TITLE NOT VESTED.—Where a husband and wife each executed a deed to the other, and both deeds were delivered to the cashier of a bank, with the understanding that upon the death of either the deed to the survivor should be recorded, and the deed of the survivor returned as ineffective, no escrow was created by the delivery of the deeds, though it was improperly called such, and no title vested under either of them.

APPEAL from a judgment of the Superior Court of Santa Barbara County. W. B. Cope, Judge.

The facts are stated in the opinion of the court.

Boyce, Taggart & Kellogg, for Appellants.

There was no delivery in escrow. (Civ. Code, sec. 1057; *Wheelwright v. Wheelwright*, 2 Mass. 447; 3 Am. Dec. 66; *Ruggles v. Lawson*, 13 Johns, 285; 7 Am. Dec. 375; *Martin v. Flaherty*, 13 Mont. 96; 40 Am. St. Rep. 415; 6 Am. & Eng. Ency. of Law, 864.) The delivery was invalid because the deeds did not pass beyond the control of the respective grantors for all time. (*Bury v. Young*, 98 Cal. 448; 35 Am. St. Rep. 186; *Ruiz v. Dow*, 113 Cal. 494, 495; *Wittenbrock v. Cass*, 110 Cal. 1.) The deeds were not effective, for want of valid delivery, and were merely testamentary. (*Babb v. Harrison*, 9 Rich. Eq. 111; 70 Am. Dec. 203, 204; *Simon v. Wildt*, 84 Ky. 157; *Wellborn v. Weaver*, 17 Ga. 267; 63 Am. Dec. 235, 242; *In re Diez*, 50 N. Y. 88, 93; *Prutsman v. Baker*, 30 Wis. 644; 11 Am. Rep. 592; *Schumaker v. Schmidt*, 44 Ala. 454; 4 Am. Rep. 135; *Evans v. Smith*, 28 Ga. 98; 73 Am. Dec. 751, 753.)^b

B. F. Thomas, for Respondent.

The deed was upon condition precedent, and was valid. (Civ. Code, secs. 695, 707, 708, 1101; 1 Rapalje's Law Dictionary, 256; 2 Blackstone's Commentaries, c. X; 2 Washburn on Real Property, 2; 6 Am. & Eng. Ency. of Law, 900; *Cannon v. Hundley*, 72 Cal. 140; *Brannan v. Mesick*, 10 Cal. 108.) The delivery was sufficient and the deed was not testamentary. No second formal delivery was necessary. (*Nichols v. Emery*, 109 Cal. 323; *Cannon v. Hundley*, *supra*; *McDonald v. Huff*, 77 Cal. 282; *Prutsman v. Baker*, 30 Wis. 650; 11 Am. Rep. 592; *Foster v. Mansfield*, 3 Met. 412; 37 Am. Dec. 154; *Perry v. Cross*, 132 Mass. 454; *Krell v. Codman*, 154 Mass. 456; 26 Am. St. Rep. 260; *Bromley v. Mitchell*, 155 Mass. 512; *Hathaway v. Payne*, 34 N. Y. 104; *Diefendorf v. Diefendorf*, 8 N. Y. Supp. 617; 132 N. Y. 100; *Crain v. Wright*, 114 N. Y. 307; *Wilson v. Carrico*, 140 Ind. 583; 49 Am. St. Rep. 213; *Seals v. Pierce*, 83 Ga. 787; 20 Am. St. Rep. 344; *Phillips v. Thomas Lumber Co.*, 94 Ky.

445; *Shaw v. Hayward*, 7 Cush. 175; *Martin v. Flaherty*, 13 Mont. 96; 40 Am. St. Rep. 415.) An escrow may be made upon condition of the happening of an event. (*Cannon v. Hundley*, *supra*; *McDonald v. Huff*, *supra*; *James v. Vanderheyden*, 1 Paige, 385; *Prutsman v. Baker*, *supra*.)

GAROUTTE, J.—This is an action in equity to reform a deed, quiet title, and for general relief. The plaintiff is the widow of Joseph A. Kenney, deceased, and the defendants are the executors of his last will and testament, joined with certain of his heirs-at-law. Judgment went for plaintiff, and this appeal is prosecuted therefrom. The leading question involved arises upon the sufficiency of the findings of fact to support the judgment, and by reason of the views we entertain upon that proposition it becomes unnecessary to review the minor matters discussed which bear upon the legal sufficiency of the complaint and which are presented by special demurrer.

The evidence presents no important conflict; and by the evidence and the findings it appears that Joseph A. Kenney, the deceased, and plaintiff were husband and wife, and each owned considerable property, both real and personal. Having no children, they entered into an agreement in writing wherein they mutually agreed to execute deeds each to the other, conveying absolutely, in fee simple, all of their respective estates, both real and personal, situated in Santa Barbara county; and agreed that said deeds should be placed as escrows in the hands of the cashier of the First National Bank in Santa Barbara, with directions to said cashier that if the plaintiff should die during the lifetime of said Joseph A. Kenney, he, the said cashier, should, on request of said Joseph A. Kenney or his agents, file the deed by the plaintiff to said Joseph A. of record in the county recorder's office in said county; and if said Joseph A. should die during the lifetime of the plaintiff, said cashier, at the request of the plaintiff or her agent, should file said deed of Joseph A. to her in said recorder's office. This agreement was executed and the deeds delivered to the cashier as therein provided. These deeds were inclosed in separate envelopes, and these envelopes were similarly indorsed by the respective parties, the

indorsement of the husband being as follows: "The inclosed deed, dated the first day of June, 1892, is herewith deposited in escrow with the cashier of the First National Bank of Santa Barbara, and the said cashier, who may be such cashier at my decease, if I should die during the lifetime of my wife, is hereby instructed and commanded at my decease, on request of my said wife or her agent, to open this envelope at once and to file the inclosed deed for record with the recorder of Santa Barbara county." Joseph A. Kenney died, whereupon his wife, the plaintiff, demanded of the cashier that his deed to her be recorded, or delivered to her. This demand was refused, whereupon she inaugurated the present litigation, claiming title to the husband's property under his aforesaid deed delivered to the cashier of the bank.

The question presented is, Has the title to the property described in the husband's deed passed to the wife? And the solution of this question depends upon the fact as to the sufficiency of the delivery of the deed by the grantor, the husband. The agreement entered into between the husband and the wife declares the two deeds are to be placed in the hands of the cashier as escrows. But so christening them did not have the effect of making them escrows. When placed in the hands of the cashier they were in no sense escrows. Where an instrument is deposited with a third party to await the performance of some condition by the grantee such instrument becomes an escrow. (Civ. Code, sec. 1057.) The evidence here presents no such case. Upon the contrary, we have a direct grant or no deed whatever.

Was the delivery of the husband's deed to the cashier sufficient to pass the title to the wife? Upon mature consideration we have arrived at the conclusion that no title whatever passed. While it is not so expressed in the agreement, yet the intention of both parties is plain that the party surviving should have his or her deed returned in case the other party should die; and that no title to the property described in the deed of the party surviving should vest. In other words, the plaintiff having survived her husband, her deed is to be returned to her and title to her property remain vested in her. Under the laws of this state the title to the prop-

erty vested presently when the deeds were delivered, or did not vest at all. Yet, as to the plaintiff's property it is apparent that no title ever vested in the husband under her deed. Such being the case as to her property, it is most difficult to see how title to his property, by his deed, ever vested in her. /

The general principles of law involved in this case are quite fully discussed in *Bury v. Young*, 98 Cal. 446; 35 Am. St. Rep. 186. In the decision of that case many authorities are cited supporting the conclusion declared, and with that conclusion we are entirely satisfied. It is there said: "The essential requisite to the validity of a deed transferred under circumstances as indicated in this case is that when it is placed in the hands of a third party it has passed beyond the control of the grantor for all time." (In the present case, by the agreement of the grantor and grantee, it was understood that the grantor's deed was to be returned to him upon the happening of a certain event, to wit, the death of the other party.) And at this time it may be assumed that the plaintiff's deed has been returned to her, or at least has been treated as of no force and effect. In the *Bury* case it is also said: "In every case where the deed has been declared invalid by reason of failure of delivery it will be found that the grantor reserved some rights over the instrument; that upon the happening of some event, or contingency, or condition, he had the right, if so disposed, to reach out and take it from the possession of the depository." The present case comes squarely within that description. Here the grantor reserved the right to recall his deed upon the happening of a certain event; when that event happened he had the right to reach out and take back the deed, and such reservation is fatal to a valid delivery) .

/ The all-controlling fact in this case, which defeats plaintiff's claim, is that when the deeds were made and delivered to the cashier of the bank the respective grantors did not absolutely part with all future dominion and control over them, but, upon the contrary, the actual intention and understanding of each grantor was that upon the death of the other the survivor should take back his own deed, and that

no title should vest under it. The decision in *Bury v. Young*, *supra*, was vested upon a directly contrary state of facts, namely, that the grantor had parted with the control and possession of his deed for all time. It is declared in that case that the doctrine there laid down would not be enlarged. The validity of the deed here involved, and upon which plaintiff rests her claims, cannot be supported without greatly extending that doctrine.

For the foregoing reasons and under the authority of *Bury v. Young*, *supra*; *Wittenbrock v. Cass*, 110 Cal. 1; and *Ruiz v. Dow*, 113 Cal. 490, the judgment is reversed and the cause remanded.

Temple, J., McFarland, J., Henshaw, J., Van Dyke, J., and Beatty, C. J., concurred.

Rehearing denied.

[Crim. No. 509. In Bank—June 19, 1899.]

THE PEOPLE, Appellant, v. PATRICK SHEA, Respondent.

CRIMINAL LAW—RAPE—EVIDENCE—CONSENT TO INTERCOURSE WITH OTHER MEN.—Upon the trial of a person charged with rape, evidence is admissible to show that the prosecutrix, previous to the time of the alleged commission of the offense charged, had consented to the having of sexual intercourse with other men.

ID.—CASE AFFIRMED—STARE DECISIS.—*People v. Benson*, 6 Cal. 221, affirmed, as having evidence the law of this state for many years, and as being supported by respectable authority, though the weight of authority may be to the contrary.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. Carroll Cook, Judge.

The facts are stated in the opinion of the court.

Tirey L. Ford, Attorney General, and A. A. Moore, Jr., Deputy Attorney General, for Appellant.

Only the general character of the prosecutrix can be shown, and not particular acts of unchastity. (2 Roscoe's Criminal Evidence, 1122; 1 McLean on Criminal Law, sec. 46; Underhill on Criminal Evidence, 480; 19 Am. & Eng. Ency. of

Law, 62; 3 Greenleaf on Evidence, sec. 214; 2 Bishop's New Criminal Procedure, 935; *Commonwealth v. Harris*, 131 Mass. 336; *Commonwealth v. Regan*, 105 Mass. 593; *State v. Fitzsimon*, 18 R. I. 236; 49 Am. St. Rep. 766; *State v. Brown*, 55 Kan. 766; *McDermott v. State*, 13 Ohio St. 332; 82 Am. Dec. 444; *State v. Knapp*, 45 N. H. 148; *McQuirk v. State*, 84 Ala. 435; *Shartzer v. State*, 63 Md. 149; 52 Am. Rep. 501; *Rex v. Hodgson*, 1 Russ. & R. 211; *Regina v. Robins*, 2 Moody & R. 512; *Regina v. Holmes*, L. R. 1 C. C. 304; *State v. Jefferson*, 6 Ired. 305; *State v. White*, 35 Mo. 500; *People v. McLean*, 71 Mich. 309; 15 Am. St. Rep. 263; *Miller v. Curtis*, 158 Mass. 131; 35 Am. St. Rep. 469 (affirming *Commonwealth v. Harris*, *supra*); *State v. Campbell*, 20 Nev. 122; *State v. Forshner*, 43 N. H. 89; 80 Am. Dec. 132; *Ritchie v. State*, 58 Ind. 355.)

A. E. Mack, and A. D. Lemon, for Respondent.

The evidence of particular acts of unchastity of the prosecutrix with other men was admissible. (*People v. Benson*, 6 Cal. 221; 65 Am. Dec. 506; *People v. Johnson*, 106 Cal. 289; *Brennan v. People*, 7 Hun, 171; *Woods v. People*, 55 N. Y. 515; 14 Am. Rep. 309; *People v. Abbot*, 19 Wend. 192; *Benstine v. State*, 2 Lea, 169; 31 Am. Rep. 593; *Titus v. State*, 7 Baxt. 132; *Shirwin v. People*, 69 Ill. 55.)

GAROUTTE, J.—Information charging the crime of rape. Defendant was convicted, and on his motion the court made an order granting a new trial, from which order the people have appealed.

The question involved in this appeal arises upon the admissibility of certain evidence. The evidence was introduced by defendant and tended to prove that the prosecutrix, previous to the time when the commission of the offense here charged was laid in the information, had consented to the having of sexual intercourse with other men. In the early case of *People v. Benson*, 6 Cal. 221, 65 Am. Dec. 506, this identical question was involved, and it was there held that such evidence was competent and admissible. In *People v. Johnson*, 106 Cal. 289, the Benson case is cited, and the court said: This class of evidence is admissible for the purpose of tending to show the non-probability of resistance upon the part of the prosecutrix. For it is certainly more probable that a woman who has done these things volun-

tarily in the past would be likely to consent than one whose past reputation was without blemish, and whose personal conduct could not truthfully be assailed."

It may be conceded that the weight of authority is opposed to the rule laid down in the Benson case. Yet there is respectable authority supporting the doctrine as there declared. (*State v. Sutherland*, 30 Iowa, 573; *Benstine v. State*, 2 Lea, 175; 31 Am. Rep. 593; *State v. Patterson*, 88 Mo. 91; 57 Am. Rep. 374; *People v. Abbot*, 19 Wend. 192; *Brennan v. People*, 7 Hun, 171; *Woods v. People*, 55 N. Y. 515; 14 Am. Rep. 309.) The Benson case was quite well considered. And in view of the fact that it has stood so many years as evidencing the law of this state upon the proposition the reasons urged for its overthrow at this time are not deemed sufficient by the court.

For the foregoing reasons the order granting the new trial is affirmed.

Henshaw, J., Temple, J., Harrison, J., and Van Dyke, J., concurred.

McFARLAND, J., dissenting.—I dissent, for the reason that in my opinion, the court erred in allowing evidence tending to show specific acts of adultery by the prosecutrix with other men. The general rule undoubtedly is that specific acts cannot be proven for the purpose of impeaching a witness; and I see no force in the reasoning that such acts are admissible because they tend to show that the prosecutrix probably consented at the time of the alleged rape. Such acts were no more admissible than would former assaults on others by a man charged with murder be admissible because they would tend to the probability that the defendant committed the murderous assault charged. In *People v. Benson*, 6 Cal. 221, Am. Dec. 506, the court was evidently not sure of its position, because, having referred to section 214 of 3 Greenleaf on Evidence, where an exactly opposite rule is declared, and which, as the court say, was probably founded upon *Rex v. Hodgson*, 1 Russ. & R. 211, and other English cases, it uses this language: "But, admitting the full force of the rule in *Rex. v. Hodgson*, *supra*, still, we are of the opinion that the circumstances of this case modify

the rule," and proceeds to say, in effect, that the prosecutrix in that case being young and ignorant, probably had no general reputation. This reasoning is entirely unsatisfactory to me, and I think that upon principle, and upon the great weight of authority, *People v. Benson*, *supra*, should be held as improperly decided. The reason that specific acts cannot be proven, while general reputation may, is as old as the law and founded upon the stable ground that a witness is supposed to be able to maintain his or her general reputation, while witnesses cannot be expected to be able to disprove testimony as to special acts to which their attention had not been called. I think that if counsel for defendant in cases like this are allowed to even ask questions tending to prove that a prosecutrix had sexual intercourse with another man, great injustice and wrong will follow. For this reason I think that the order granting a new trial should be reversed.

[S. F. No. 1130. Department One.—June 20, 1899.]

E. V. SCHEERER, Appellant, v. JAMES W. GOODWIN
et al., Respondents

EJECTMENT—WRIT OF RESTITUTION—AUTHORITY OF SHERIFF.—Under a writ of restitution issued upon a judgment for the plaintiff in an action of ejectment, the sheriff is authorized to remove from the land of the defendants and all persons found thereon, whose possession was derived under the defendants or either of them.

ID.—PRESUMPTION AS TO POSSESSION UNDER DEFENDANTS—BURDEN OF PROOF—POSSESSION UNDER STRANGER.—The burden of proof is upon all persons coming into possession subsequent to the commencement of the action of ejectment to show affirmatively that their possession is rightful, and under a title not determined in the action, and was not taken by collusion with the defendants; and in the absence of a showing to the contrary, it will be presumed that they came in under the defendants. This presumption is not overthrown by showing that they came in under a stranger to the action, unless it is also shown that such stranger was in possession at or prior to the commencement of the action.

ID.—INJUNCTION AGAINST EXECUTION OF WRIT—ABSENCE OF TITLE—COLLUSIVE ENTRY.—An injunction cannot be maintained to enjoin the execution of the writ of restitution, in favor of a possessor claiming under a deed from a third person dated prior to the commencement of the action of ejectment, where it appears that such third person had no title to the premises, and merely had a conveyance from a defendant in ejectment after he had parted with his

rights, and which was intended as a security for indebtedness; and that the entry of the plaintiff in the injunction suit, after the commencement of the action of ejectment, was by collusion with the defendant in that action, with intent to deprive the plaintiff therein of the fruits of his judgment.

Id.—EVIDENCE—POSSESSION OF GRANTOR—IMPEACHMENT.—Where the defendant in the ejectment suit testified for the plaintiff in the injunction suit that he had delivered the possession of the premises to the plaintiff's grantor prior to the commencement of the ejectment suit, he may be impeached by proof that on the trial of the ejectment suit he testified that he himself had been in possession of the premises for about two years under a lease from the city, which lease described the premises in controversy, and was the only lease he had taken from the city.

Id.—ADVISORY VERDICT OF JURY—INSTRUCTIONS NOT SUBJECT TO EXCEPTION.—In an equitable action for an injunction, the verdict of a jury is merely advisory; and though the court, in its findings of fact, adopts the conclusion of the jury, its instructions to the jury are not the subject of an exception.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. John Hunt, Judge.

The facts are stated in the opinion of the court.

Charles G. Nagle, and Nagle and Nagle, for Appellant.

Edward R. Taylor, for James W. Goodwin, Respondent.*

Reddy, Campbell & Metson, for Richard I. Whelan, Sheriff, Respondent.

HARRISON, J.—The defendant Goodwin brought an action in ejectment against Joseph Scheerer and the city and county of San Francisco in 1892, in which judgment was rendered in his favor December 30, 1892, from which an appeal was taken and the judgment affirmed in this court. (*Goodwin v. Sheerer*, 106 Cal 690.) After the *re-mittitur* had been filed in the superior court he caused a writ of restitution to be issued upon the judgment, and while the sheriff was in the execution of this writ the plaintiff herein brought the present action against him and the sheriff for an injunction against its execution, and for damages, upon the ground that he was in possession of the property and the owner thereof. Upon the trial of the cause, the court found that the plaintiff had never been the owner of the property, and that his possession thereof was taken by collusion with Joseph Scheerer, his father, for the purpose of evading the

force of the aforesaid judgment. Judgment was accordingly rendered in favor of the defendants, from which the present appeal is taken.

Under the judgment of the action of *Goodwin v. Scheerer*, *supra*, the sheriff was authorized to remove from the land the defendants in that action, and all persons found thereon whose possession was derived under the defendants therein, or either of them; and, in the absence of any showing to the contrary, it will be presumed that all persons coming into possession of the premises subsequent to the commencement of that action came in under the defendants therein. This presumption is not overthrown by showing that they came in under a stranger to the action, unless they also show that such stranger was in possession at or prior to the commencement of the action, or was entitled to the possession by virtue of a title adverse to that of the plaintiff in the action, which the court would be authorized to protect against the enforcement of the judgment. Upon the issue of their right to remain in possession the burden is upon them to show affirmatively that their possession is rightful and under a title that has not been determined in the action, and that such possession was not taken by collusion with the defendants in the judgment. (*Long v. Neville*, 29 Cal. 131; *Leese v. Clark*, 29 Cal. 664; *Weatherbee v. Dunn*, 36 Cal. 147; 95 Am. Dec. 166.)

The findings of the court that the plaintiff never had any interest in the land, and that his entry upon the land was by collusion with his father for the purpose of evading the judgment against his father, necessitated a judgment in favor of the defendants. We are of the opinion, moreover, that the evidence before the court authorized it to make these findings.

The plaintiff's claim of title to the land rests upon a conveyance to him by one Freund, and he can have no right to resist the execution of the writ by virtue of this conveyance, unless Freund could himself have resisted the writ. Freund's rights in the property are based upon a deed made to him by Joseph Scheerer, in July, 1891, but Joseph Scheerer could convey no greater rights than he himself then had in the

land. He testified that in 1875 he "bought out" the contracting firm of Brunt & Thurston, but there is nothing in the record showing that Brunt & Thurston had any possession of the premises or interest in the land, and it was shown that in December, 1890, Joseph Scheerer took a lease of the land from the city and county of San Francisco for the term of three years from that date; and, in the absence of any other evidence on the point, his possession thereafter would be referable to this lease. In February, 1891, he sold and assigned to the "Joseph Scheerer Company, a corporation," this lease, together with all his right and interest in the property described in the lease, so that at the date of his deed to Freund he had no interest in the property which he could transfer to him. The court was also authorized to find from the testimony of Freund that the conveyance to him by Scheerer was merely a security for Scheerer's indebtedness to him.

The court was also authorized to find that the subsequent entry of the plaintiff was collusive and fraudulent. He testified that he had never heard of the suit of *Goodwin v. Scheerer, supra*, or of his father's litigation with the city, but it was shown that he was present in court during a portion of the trial of that action. He also testified that he did not know whether his father ever occupied or was in possession of the property, but he admitted that he had been working for his father for several years, and had been living with him during all the time. The case of *Goodwin v. Scheerer, supra*, was argued in the supreme court in February, 1895. March 16, 1895, the plaintiff took a bill of sale from the "California Paving Co." of all the personal property upon the lot. This bill of sale purported to be for the sum of fifteen hundred dollars, but he testified that it was given to him for wages due him from the paving company. His father, as president, of the paving company, executed the bill of sale to him, and he testified that he then agreed with his father that the company could remain there without any charge for rent, if they desired it, and as long as they chose, but that he made no agreement on the subject with the company, and that the company continued to use the premises for its business. His father was

the president and general manager of the company, and Freund was also a member and one of the directors of the paving company; but the plaintiff testified that he did not know whether he was the secretary of the company at that time or not. The judgment in *Goodwin v. Scheerer, supra*, was affirmed in this court April 3, 1895, and in the ordinary course of procedure the *remittitur* thereon would issue on the 3d of May. On May 1st the plaintiff received his deed from Freund and assumed control of the property. The observations of the court in *Weatherbee v. Dunn, supra*, are appropriate here: "We are satisfied, as the court below must have been, that this case presents another instance of an indirect effort through other parties to evade the process of the court and deprive the plaintiff in an action to recover land, after a long and successful litigation, of the fruits of his judgment."

Joseph Scheerer testified that he had not been in possession of the land since he gave the deed to Freund; that at that time he delivered the possession over to Freund. Upon cross-examination his testimony at the trial of the action of *Goodwin v. Scheerer, supra*, was called to his attention, and and the plaintiff objected thereto on the ground that, as he was not a party to that action, he could not be bound by the judgment or proceedings therein. The court overruled his objection, to which an exception was taken, and allowed the witness to be questioned thereon. It was competent upon the cross-examination of this witness, for the purpose of impeaching his testimony that he had delivered the possession to Freund, to show that he had given contrary testimony at the former trial. It is true that the judgment in that action would not be evidence against the plaintiff herein that Joseph Scheerer was in possession of the land at the time that action was brought, but it was competent to show as a fact herein that he was at that time in possession, and, if such fact could be shown, the judgment would be binding upon all persons thereafter coming in under him. It appeared that at the former trial he testified that he took possession of the premises about two years previously thereto under a lease from the city; that he was then put into possession by the superintend-

ent of streets, and had been there ever since. Upon this testimony being called to his attention he said that it referred to other property than that involved herein, but it was shown that the property described in the lease was the same as that described in the complaint in this action, and also in the complaint in the action of *Goodwin v. Scheerer, supra*; and the witness also testified that this was the only lease that he had ever taken from the city. Under this evidence the court was fully authorized to find that he was in the possession of the land at the time of the former action, and, under its finding that the entry of the plaintiff herein was under him, he was bound by the judgment in that action.

The action herein is in equity, but the court called in a jury to aid it in its decision, and a verdict was rendered by the jury in favor of the defendants. It does not appear that there were any special issues submitted to the jury. The court, however, made its findings of facts, in which it adopted the conclusion of the jury. The appellant has objected to certain instructions given to the jury, but, as the verdict was merely advisory to the court, these instructions are not the subject of an exception. (*Richardson v. Eureka*, 110 Cal. 441)

The judgment and order are affirmed.

Garoutte, J., and Van Dyke, J., concurred.

[Sac. No. 642. In Bank.—June 20, 1899.]

HARRIET H. SAUNDERS, Administratrix, et cetera, Appellant, v. LA PURISIMA GOLD MINING COMPANY et al., Respondents.

SCHOOL LANDS OF STATE—CONCLUSIVENESS OF PATENT—CHARACTER OF LAND—COLLATERAL ATTACK BY MINING CLAIMANTS.—Where public land of the United States was surveyed and sectionized, and designated upon the survey as agricultural land, and was thereafter certified as such by the land department of the United States, and listed as such to the state for school purposes, under the grant of 1853, and was subsequently patented, by the state as agricultural land, the investigation as to the character of the land is concluded, as against a collateral attack; and no persons subsequently intruding upon the patented land, for the purpose of mining, can

assail the state patent by proof that the land was mineral at the time of the grant to the state, and was reserved as such from the grant.

ID.—GRANT OF SCHOOL LANDS TO STATE—ABSENCE OF KNOWN MINERALS.—The grant by Congress to this state of the sixteenth and thirty-sixth sections, by the act of 1853, was a grant *in presenti*, and if at that time there were no known minerals, or other exceptions noted in the grant, those sections then became the land of the state.

ID.—ADJUDICATION AS TO CHARACTER OF LANDS—CASE OVERRULED.—The decisions of the land department of the United States as to the nonmineral character of a school section, and as to the absence of any exceptions or limitations contained in the act of 1853, and the subsequent patent of the state therefor, are conclusive adjudications as to the character and condition of the land, as against all third parties subsequently entering upon the land. *Hermocilla v. Hubbell*, 89 Cal. 5, overruled, on this point.

APPEAL from an order of the Superior Court of Tuolumne County for granting a new trial. G. W. Nicol, Judge.

The facts are stated in the opinion of the court.

J. B. Curtin, for Appellant.

J. P. O'Brien, for Respondent.

VAN DYKE, J.—This action is to determine conflicting claims to a tract of land, being a portion of section 36, township 2 north, range 13 east, Mount Diablo meridian, containing six hundred acres, located in Tuolumne county.

On September 1, 1870, the official United States survey of said township was completed, and the lands therein sectionized. On the eighteenth day of February, 1871, the official plat of said township was approved by the United States surveyor general for California, and filed in his office. In this official plat of said township section 36 was marked and returned as being agricultural land and unoccupied. On the seventh day of December, 1871, the commissioner of the general landoffice directed the register of the United States landoffice at Stockton, in which district said land was located, to withhold, from sale or disposal, among other lands said township 2; and on April 27, 1880, the secretary of the interior, by an order, revoked said withdrawal, and thereafter on September 6, 1884, the register of said United States landoffice issued to the state of California his certificate in due

form, reciting that there were no persons occupying or in possession of any portion of said section 36, and there were no homestead pre-emptions or other valid claims thereto, or to any part thereof, adverse to the state of California. On the first day of September, 1890, the state of California issued to Robert B. Parks its patent in due form for the premises in controversy. Thereafter, on December 11, 1895, by proper mesne conveyance, the title to said lands was granted to and became vested in the plaintiff's intestate, Henry H. Saunders. That said Saunders thereupon entered into possession, and with his family occupied said tract of land up to the time of his death, June 20 1897, and the plaintiff thereafter continued in such possession. In August, 1896, defendants Elder and Maguire entered upon a portion of said described lands and commenced to run a tunnel and work a quartz claim, and thereupon filed a notice of mining location, designating the same as "the north extension of the La Purisima claim." This action was commenced in August, 1897. Defendants Elder and Maguire rely upon said mining location and contend that said land is mineral land and never passed to the state of California, and that the patent issued therefor is void. All the other defendants were defaulted. On the trial defendants offered "to prove that the land in controversy—namely, the north extension of the La Purisima quartz mining claim—was expressly excepted from the grant to the state of California by the act of Congress approved March 3, 1853, as the same is mineral land." Plaintiff's objection to this offer was sustained by the court, and judgment went for the plaintiff. Thereafter, upon motion of the defendants, the court granted a new trial on the ground, as stated in the order, "for the sole reason that the court erred in sustaining the objection to said defendants' Maguire and Elder offered evidence as to the mineral character of the land in controversy."

This appeal is from the order granting a new trial, and the question presented here is whether the court did or did not err at the trial in excluding the offered evidence:

The respondents rely upon *Hermocilla v. Hubbell*, 89 Cal.

5, in support of the order of the court granting them a new trial. Although the facts in that case are different from those in this, still it must be confessed that said case furnishes support to the contention of respondents. The opinion seems to rely upon *Mining Co. v. Consolidated Min. Co.*, 102 U. S. 168, and it is said with reference thereto: "That decision is controlling and must be followed here. The question then remains, Were the disputed premises at the time of the grant mineral land—that is, known to be valuable for minerals?"

The facts as found in *Hermocilla v. Hubbell*, *supra*, were that during the year 1850, and continuously ever since, and when the said patent was issued on the tenth day of December, 1870, and at the time of the survey of said lands (being a portion of the sixteenth section), "they were and have been, and now are, known to be public mineral lands of the United States, having therein known valuable mineral deposits." Whereas, in the United States case, referred to by the commissioner as controlling, and to be followed by this court, the facts were that there were three mining claims on the land in controversy—one located in 1851, another one in 1853, and the other in 1863, the last being seven years before the public survey of the tract, which was in 1870. The mining patent was applied for on these locations nearly two years before the state patent was issued and subsequently and within a year thereafter the United States patent was issued on said mining locations. Hence the contest in that case was between two conflicting patents. Whereas, in *Hermocilla v. Hubbell*, *supra*, the contest was in the nature of a collateral attack upon a state patent, on the ground that the land was mineral land. It is said in the latter case: "The question then remains, "Were the disputed premises at the time of the grant mineral lands—that is, known to be valuable for mineral lands?" But another and equally important question seems to have been overlooked by the court in that case, and that is, By whom and at what time are the facts to be ascertained and determined as to the character of the land at the time of the grant, whether mineral or nonmineral? And another question of equal importance is as to the effect of a

patent, issued by competent authority, purporting to convey such land.

The decisions of the supreme court of the United States upon both of these questions are so numerous and so uniform (and the decisions of this court are in the same line, with few exceptions) that both questions now ought to be considered well settled. The first is, that by the laws of Congress providing for the patenting of certain public lands, upon the ascertainment of certain facts, the proper officers of the land department of the general government have jurisdiction to inquire into and determine those facts; that is, of a large body of public lands be subject to sale or other disposition, but subject to reservation of such parts as may be found to be of a particular character, as swamp or mineral land, the land department has jurisdiction to determine the character of any part thereof, and its decision is conclusive. In *Steel v. Smelting Co.*, 106 U. S. 447, Mr. Justice Field, speaking for the court, says: "We have so often had occasion to speak of the land department, the object of its creation, and the powers it possesses in the alienation by patent of portions of the public lands, that it creates an unpleasant surprise to find that counsel, in discussing the effect to be given to the action of that department, overlooked our decisions on that subject. That department, as we have repeatedly said, was established to supervise various proceedings whereby evidence of a title from the United States to portions of the public domain is obtained, and to see that the different requirements of acts of Congress are fully complied with. Necessarily, therefore, it must consider and pass upon the qualifications of the applicant, the acts he has performed to secure the title, the nature of the land, and whether it is of a class which is open to sale. Its judgment upon these matters is that of a special tribunal, and is unassailable except by direct proceeding for its annulment or limitation. Such has been the uniform language of this court in repeated decisions."

In this case it was shown that the land in question was surveyed and sectionized—whereas the act of Congress directed that in case of mineral lands it should not be sectionized—and that the plat of survey showing the land to be agricultural land, in other words, not mineral, was returned and

properly approved. As a further measure of precaution, and to allow abundant opportunity for a full investigation and ascertainment of the character of the land, the disposal of the same was suspended for a number of years, and finally, it having been determined that it was of the character of land subject to be granted to the state, a certificate was issued by the proper United States authorities to the state of California, certifying its right to the section of land in question under the grant of 1853. The state's patent thereupon issued to the plaintiff's grantor long prior to the intrusion of the defendants for the purpose of mining. Under the rule just cited, this concluded the investigation as to the character of the land, except on a direct proceeding to set aside the patent on the ground of fraud or other invalidity.

The case of *Gale v. Best*, 78 Cal. 235, seems to have been overlooked—at any rate it is not noticed—in the preparation of the opinion in *Hermocilla v. Hubbell*, *supra*. In that case the plaintiff claimed under a patent to a tract of land under a railroad grant. The defendants claimed by right of possession, upon the ground that it was mineral land, and that all mineral lands are reserved in the grant of Congress to said railroad company. In affirming the judgment of the court below this court, after reviewing quite fully the cases bearing upon the question, says: "Our opinion is, that where a patent issues for public land under a law which provides for its disposition as agricultural land—either to a railroad company or to pre-emption or homestead claims—and there is no reservation in the law except a general one of mineral lands, and no reservation at all in the patent, then the patent must be considered as a conclusive determination by the government that the land is agricultural." This case was referred to and approved in *Dreyfus v. Badger*, 108 Cal. 58, which, it will be seen, was some time after the *Hermocilla* case relied upon by the respondent here. Dreyfus, the plaintiff, relied upon a state patent issued on state lieu school lands, and the defendant as a pre-emptioner, antedating his right as such prior to the patent by the state. In affirming the judgment of the lower court this court says: "A defendant may defeat an action of ejectment by showing that plaintiff has no title. But where a patent, regular on its face,

has been issued by the government (federal or state) for land which it owns, under a law providing for the disposal of the land patented, upon the ascertainment of certain facts, the officers of the land department of the government have jurisdiction to determine such facts, and the issuance of a patent is, upon collateral attack, a conclusive declaration, as against all claiming under said government, that the facts have been found in favor of the patentee. 'And this rule applies to the determination of the particular character of the land which is the subject of the patent.' This was expressly held in *Gale v. Best*, *supra*, where we alluded to the authorities at some length, and basing our conclusions on decisions of the supreme court of the United States (citing a number) we declared the law to be as above stated. These cases involved patents of the general government; but, upon principle, the rule applies with equal force to a patent of the state government. Moreover, it has been so expressly held in this court in *Doll v. Meador*, 16 Cal. 295, where it was decided that 'the patent is the record of the state, that the land was subject to location under the grant of the United States, and has been located,' and *Ah Yew v. Choate*, 24 Cal. 562, where it was held that the patent is also 'a record of the judgment of the state, by its officers duly appointed for that purpose, and that the conditions and characteristics of the land were not such as to constitute it mineral within the meaning of the provisions of the statute.' " *Irvine v. Tarbat*, 105 Cal. 237, is to the same effect, and is referred to and approved in *Dreyfus v. Badger*, *supra*.

To quote from the numerous adjudicated cases in the United States supreme court would be a waste of time and lengthen this opinion beyond reasonable limits, and it will be sufficient merely refer to some of them. (*Steel v. Smelting Co.*, *supra*; *St. Louis Smelting Co. v. Kemp*, 104 U. S. 644; *French v. Fyan*, 93 U. S. 169; *Barden v. North. Pac. R. Co.*, 154 U. S. 288; *Wright v. Roseberry*, 121 U. S. 488; *Heath v. Wallace*, 138 U. S. 573; *McCormick v. Hayes*, 159 U. S. 332; see, also, *Cowell v. Lammers*, 10 Saw. 250.)

The cases relied upon by the respondent when examined, it will be seen, do not conflict with the general tenor of the decisions already cited. In those cases the lands in question were shown not to have been subject to sale or disposition, at the time the right alleged accrued on which the patent was issued, and the patents therefore were issued without authority of law. For instance, *Burfenning v. Chicago etc. Ry. Co.*, 163 U. S. 321, involved title to certain islands in the Missis-

issippi at Minneapolis. At the date of the homestead selection in that case, on which the patent was issued, these islands were within the limits of said city; and the invalidity of the patent was based upon the fact that "lands included within the limits of any incorporated town or selected as the site of a city or town" were by the laws of Congress excluded from the right of pre-emption and homestead claims. The court, of course, sustained that contention on the ground that the action of "the land department cannot override the express will of congress or convey away public lands in disregard or defiance thereof." At the same time the court announced this as a rule: "It has undoubtedly been affirmed over and over again that in the administration of the public lands system of the United States questions of fact are under the consideration and judgment of the land department, and that its judgment thereon is final. Whether, for instance, a certain tract is swamp land or not, saline land or not, mineral land or not, presents a question of fact not resting on record, dependent on oral testimony; and it cannot be doubted that the decision of the land department one way or the other, in reference to these questions, is conclusive and not open to litigation in the courts, except in those cases of fraud, et cetera, which permit any determination to be re-examined.") Citing *Johnson v. Towsley*, 13 Wall. 72; *Smelting Co. v. Kemp*, *supra*; *Steel v. Smelting Co.*, *supra*; *Wright v. Roseberry*, *supra*; *Heath v. Wallace*, *supra*; *McCormick v. Hayes*, *supra*.)

As already stated, and held in numerous cases, the grant by Congress to this state of the sixteenth and thirty-sixth sections, by the act of Congress of 1853, was a grant *in presenti*, and if at that time there were existing no known minerals, or other exceptions noted in the grant why the lands should not pass to the state, it at that moment became the land of the state. The investigations of the officers of the land department in this case show that the land in question did not fall within any of the exceptions or limitations contained in the act; and subsequently, and long prior to any claim on the part of the defendants, the land was properly certified to and patented by the state to the plaintiff's grantor. Any rule which would permit intrusion upon the premises

so conveyed and patented by the state, under such circumstances, long after the lands had passed into the hands of presumably innocent third parties for value, would be a reproach to our laws and jurisprudence.

If such claims as that presented by the defendants here were sanctioned by the court, a patent to lands in this state, instead of being a muniment of title, would simply be an invitation to parties to invade the premises for the purpose of ascertaining whether facts and conditions existed prior to the grant or patent so as to avoid the same; and it would be the same whatever the nature of the land might be. In case of a patent to mining lands, an investigation could be had years after the date of the patent, and after the title to the ground had passed to innocent third parties, to determine whether it was not agricultural land, and more valuable for that purpose than for mining; or in case of a pre-emption or homestead claim, patented by the United States, an investigation could be set on foot at any period, and as against any party, whether innocent or otherwise, who might be the holder of the title, to ascertain whether the land was, at the initiation of the claim on which the patent is based, of the character subject to pre-emption or homestead—for instance, that it was mineral land, or swamp or overflowed land, or any other class falling within the exceptions specified in the laws of Congress. Such a condition as this would be simply intolerable, and there would be no confidence or certainty in land titles in this state.

The court below properly sustained the objection to the offered testimony, and its judgment was correct, and should have been allowed to stand.

The order granting a new trial is reversed.

Garoutte, J., Harrison, J., McFarland, J., Temple, J., Henshaw, J., and Beatty, C. J., concurred.

[Sac. No. 572. Department One.—June 20, 1899.]

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B. F. BERGEN et al., Respondents, v. EDWARD FRISBIE,
Appellant.

CONTRACT—VALIDITY—INFLUENCING PATENTS FROM SECRETARY OF INTERIOR.—A contract by a person having timber-land entries, for the services of an attorney to influence the official action of the secretary of the interior favorably to the issuance of patents upon such entries, without any stipulation for the use of improper means or methods, and to pay for such services a percentage of the value of the timber-lands, contingent upon success, is not void as against good morals or public policy.

ID.—CONTINGENT FEE—SECURING FAVORABLE DECISION.—The contingent character of the fee fixed by the contract does not affect its validity; nor does the fact that the attorneys were retained to secure a favorable decision of the matters pending before the secretary of the interior taint the contract.

ID.—MEANS AND MANNER OF EMPLOYMENT—PRESUMPTION.—The means and manner of the employment are the factors which determine the validity or invalidity of the contract; and in the absence of any showing that the means and methods to be used, or which were used, by the attorneys, were improper, it will be presumed that the contract is valid and enforceable.

APPEAL from a judgment of the Superior Court of Shasta County and from an order denying a new trial. Edward Sweeney, Judge.

The facts are stated in the opinion of the court.

Garter, Dozier & Wells, for Appellant.

F. P. Primm, for Respondents.

GAROUTTE, J.—Defendant Frisbie had certain matters pertaining to timber land entries made by him pending before the secretary of the interior at Washington. He had paid two thousand and fifty dollars to the government upon these entries, and was desirous of the issuance of the patents to him for the land. These matters had been long delayed in the land department, whereupon defendant entered into a contract with plaintiffs, whereby he engaged their services as attorneys for the purpose of having the said entries ratified and declared valid; and if such ratification and confirmation could not be accomplished, then to take action to recover from the government the said sum of two thousand and fifty dollars, paid as aforesaid.

This contract provided: "In consideration of such services the said party of the first part has this day. . . . and in addition, provided said parties of the second part succeed in securing a favorable and final decision in favor of said entries, the said party of the first part will pay the said attorneys ten per cent of the then value of the lands embraced in said entries, and should the said attorneys fail in securing such favorable decision, but in lieu of which they succeed in having the United States refund the said two thousand and fifty dollars to the said party of the first part, then in that case the said party of the first part agrees to pay the said attorneys five per cent of the amount so recovered." Under this contract plaintiffs wrote various letters to the land department at Washington, urging an early decision of the pending matters, and also retained a firm of attorneys at that place to assist in securing a favorable conclusion of the matters pending. In the course of time patents were issued to defendant, and thereafter plaintiffs brought this action under the contract to recover ten per cent of the value of the land as their compensation. Judgment went for plaintiffs, and defendant has appealed from the judgment and order denying his motion for a new trial.

Defendant declares that: "The contract relied upon by the plaintiffs was for services to be performed by them for the defendant by influencing the official action of public officers of the government favorable to the defendant on matters then pending before such officers for compensation contingent upon success. Such a contract is void as against good morals and public policy, and the performance of the services under such a contract affords no ground of recovery." He attaches much importance to the fact that the fee fixed by the contract for the services to be performed was dependent upon success, namely, issuance of the patents. As tending to indicate the immorality of the contract, the contingent character of the fee works no such result. The contract is good or bad, regardless of that question. (*Hoffman v. Vallejo*, 45 Cal. 564; *Stanton v. Embry*, 93 U. S. 548.)

We have carefully scanned the face of this contract, and find nothing whatever there to justify a judicial declaration

that it is against good morals. There was no secrecy, no deception, no fraud, no corruption. It was an ordinary, everyday contract. Thousands of similar import, probably, have been made and executed. The fact that plaintiffs were retained to assist in securing a favorable decision of the matters pending, certainly does not taint the contract. Defendant would hardly engage their services for any other purpose. It is next claimed that the evidence discloses that plaintiffs did nothing under the contract except expedite the decision of the litigation. Even if it should be conceded that their labors were largely directed toward that end, still such labor upon the part of these attorneys is not of itself unprofessional. The means and manner to be employed are the all-important factors in marking the validity or invalidity of the contract. We see no one of its provisions that stamp it void as against public policy and good morals. Neither do we find anything in the evidence indicating any act done by the plaintiffs that to any degree could be construed improper. The employment of persons to influence legislation, or to influence decisions of the land department, or even the decisions of judicial tribunals, in a proper way, is not against sound public policy, and this, too, even though the compensation for the labor to be performed is contingent upon successful results. The means and methods to be used must be improper, or else such employment is perfectly legitimate in the eyes of the law. We do not see how a contract upon its face would be void as against public policy, whereby attorneys were retained by a party litigant to assist in securing a favorable decision from this court upon litigation pending before it—even though the compensation of such attorneys was to be contingent upon success. In the absence of anything showing to the contrary, this court would certainly assume it to be valid and enforceable at law. If such be the rule of law as to contracts pertaining to the judicial action of this court, that law is good enough to be applied upon a contract in a matter pending before the secretary of the interior.

For the foregoing reasons the judgment and order are affirmed.

Van Dyke, J., and Harrison, J., concurred.

[L. A. No. 474. Department One.—June 21, 1899.]

J. W. BLACKBURN et al., Appellants, v. M. BELL,
Respondent.

THRESHER'S LIEN—LIMITATION OF ACTION.—The thrasher's lien, given by the act of 1885 (Stats. 1885, p. 109), for work done while a threshing machine is engaged in threshing, is purely statutory, and the right to the same cannot be extended beyond the limits prescribed by the plain language of the law. The lien expires by limitation, unless action is brought to recover the amount of the claim within ten days after the party ceases work.

APPEAL from a judgment of the Superior Court of San Luis Obispo County and from an order denying a new trial. E. P. Unangst, Judge.

The facts are stated in the opinion of the court.

P. O. Chilstrom, and G. F. Witter, Jr., for Appellants.

Charles A. Palmer, and G. Ward Kemp, for Respondent.

VAN DYKE, J.—The plaintiffs were engaged in San Luis Obispo county as threshers, and the action is for their wages as such and to enforce a thrasher's lien under the act of 1885. (Stats. 1885, p. 109.) The act reads as follows:

"Section 1. Every person performing work or labor of any kind in, with, about or upon any threshing machine, the engine, horse-power, wagons, or appurtenances thereof, while engaged in threshing, shall have a lien upon the same to the extent of the value of his services.

"Sec. 2. The lien herein given shall extend for ten days after the person has ceased such work or labor.

"Sec. 3. If judgment shall be recovered in any action to recover for said services for work or labor performed, and

said property shall be sold, the proceeds of such sale shall be distributed *pro rata* to all judgment creditors who have, within ten days, begun suits to recover judgments for the amount due them for such work.

"Sec. 4. The lien shall expire unless a suit to recover the amount of the claim is brought within ten days after the party ceases work."

The findings of the court bearing on the question involved in the appeal are as follows:

"1. That each and every one of the plaintiffs mentioned in said complaint was employed by the defendant to do and bid perform work and labor in, with, and upon the threshing machine and appurtenances mentioned and described in said complaint while the same was engaged in threshing during the threshing season of 1896.

"2. That each and every one of said plaintiffs ceased such work and labor on September 16, 1896, between 11 and 12 o'clock A. M., and at no time since then has been engaged in such work and labor for defendant or any one on said machine.

"3. That no threshing has been done at any time with said machine since September 16, 1896.

"4. That such work and labor had ceased for more than ten days before plaintiff commenced this action."

The action was commenced September 28, 1896, and as a conclusion of law the court found in favor of the plaintiffs for their money demand, in the aggregate sum of four hundred and sixteen dollars and sixty-five cents, but that plaintiffs have no liens upon, and cannot enforce the lien against the threshing machine and appurtenances mentioned and described in said complaint, or at all.

The plaintiffs appeal from so much of the judgment as declared that the said plaintiffs had no lien and were not entitled to an attorney's fee, and from the order denying said plaintiffs' motion for a new trial.

The evidence abundantly supports the findings of fact, and is all one way as to the time when work in the threshing ceased. Plaintiff Frank Kite, testifying in his own behalf, says: "We did no threshing for anybody after about noon

of the sixteenth day of September, 1896. I did not know of anything further to do; suppose it was the last job." Plaintiff Ed. Copsey, in his own behalf, says: "The last day the machine was engaged in threshing was the sixteenth day of September, 1896. We quit about noon." Plaintiff Tom Fiers, in his own behalf, says: "The machine quit on the sixteenth of September, 1896, about noon; did no work after the sixteenth that I know of." Defendant Bell says: "The machine has not done any threshing in this county for anybody since about noon, September 16, 1896." Witnesses W. D. Ashe and W. H. Brown, for defendant, testified to the same effect. Plaintiff Joe Copsey, in rebuttal, after stating that Bell had agreed to give them two days extra, says: "I knew the work was finished on the sixteenth day of September, 1896." William Mitchell, for plaintiff, says: "We quit threshing about noon on the sixteenth day of September, 1896." This is all the testimony in reference to the time when the threshing ceased.

The statute gives a lien for services mentioned therein "while engaged in threshing," and "the lien shall expire unless a suit to recover the amount of the claim is brought within ten days after the party ceases work."

The lien in question is purely statutory, and the right to the same cannot be extended beyond the limits prescribed by the plain language of the law. The work while engaged in threshing having ceased on the sixteenth of September, the lien expired before the action was commenced, to-wit, September 28th.

The judgment and order denying a new trial are affirmed.

Harrison, J., and Beatty, C. J., concurred.

[S. F. No. 1056. Department One.—June 21, 1899.]

THOMAS ROCHE, Respondent, v. W. P. REDINGTON
et al., Appellants.

NEGLIGENCE—INJURY OF STREET SWEEPER BY VEHICLE—INSTRUCTION—

SLIPPING OF WHEELS.—In an action to recover damages for personal injuries caused to the plaintiff while sweeping the street, by the negligent and too rapid driving of defendant's vehicle which struck plaintiff with its wheels, where there is evidence tending to sustain the action, an instruction to the effect that it cannot be said that the mere slipping of the wheels upon the wet street-car track, while the driver was attempting to turn out to avoid striking the plaintiff, would not conclusively, or as a matter of law, repel the imputation of negligence, is proper, and does not charge the jury with respect to matters of fact.

Id.—SUPPORT OF VERDICT—SUFFICIENCY OF EVIDENCE.—Where the evidence in such action, though conflicting upon some points, tended to show that the vehicle was driven with considerable speed almost onto the plaintiff, before the driver pulled the horse out of the street-car track, and that plaintiff was struck by the hind wheels of the vehicle, which held the track, and slewed forward, and that the injury was the result of want of ordinary care and prudence, if not of recklessness, on the part of the driver, and was without the fault of the plaintiff, who was not aware of his danger, the evidence is sufficient to justify a verdict for the plaintiff.

Id.—EXCESSIVE DAMAGES—REVIEW UPON APPEAL—PASSION OR PREJUDICE.—Where the evidence tends to show that the injury to the plaintiff was serious, and resulted in the permanent shortening of a broken leg, and rendered plaintiff less able than formerly to do a day's work, and that he had not recovered at the time of the trial, and was then suffering pain from the injury, a year and a quarter thereafter, a verdict for damages, in the sum of four thousand dollars, cannot be said by this court to have been given as to any excess by the jury under the influence of passion or prejudice, on which ground alone can the amount of a verdict for damages be disturbed upon appeal, as excessive.

Id.—EVIDENCE—ABILITY TO EARN MONEY.—A question asked of the plaintiff, whether he had earned any money since the accident, or had been able to earn any money since, is not objectionable, where it appears from the evidence of plaintiff, in connection therewith, that the question related to his condition as the result of the accident.

— APPEAL from a judgment of the Superior Court of the

City and County of San Francisco and from an order denying a new trial. John Hunt, Judge.

The facts are stated in the opinion.

Chickering, Thomas & Gregory, and Van Ness & Redman, for Appellants.

Charles F. Hanlon, for Respondent.

CHIPMAN, C.—Action for personal injury. Trial by jury and verdict for plaintiff awarding him four thousand dollars' damages. Defendants appeal from the judgment upon the verdict and from the order denying motion for a new trial. On September 10, 1895, plaintiff was in the employ of the city and county of San Francisco as a street sweeper. An employee of defendants in the course of his employment, was driving a business buggy or vehicle, drawn by one horse, along Kearny street, and while so driving the hub of one of the hind wheels of the vehicle struck plaintiff breaking his thigh bone and otherwise seriously injuring him. The evidence tends to show that the driver of the vehicle, one Goddard, was the solicitor of defendants and was engaged in the discharge of his duties as such at the time of the accident; that plaintiff, about 10 o'clock A. M. of September 10th, was lawfully in the employ of the city, and was rightfully engaged in the discharge of his duties, and was standing near to, but just outside, the east rail of the west track on Kearny street, about thirty-five feet north of the north crossing of Jackson street, and was in the act of pushing the debris southwesterly from within the west track toward the west side of the street, with his back turned north toward Pacific street; he was an old man of seventy-three years, but in good general health and vigorous and strong for one of his age, and able to do a good and satisfactory day's work as a street sweeper. Goddard took the west track on Kearny street with his wagon at Pacific street, and drove at a speed of about five or six miles an hour toward Jackson street and where plaintiff was working; plaintiff's feet were outside the track, but he was stooping over and his head and body were over the track; at a distance of about two hundred feet from plaintiff, Goddard noticed plaintiff, and he testi-

fied that he called out to plaintiff, but plaintiff testified that he heard no call and no noise, although his hearing was good, until the horse was beside him. He straightened up and endeavored to protect himself with his broom, but the wagon struck him immediately, and so soon that it was not possible for him to get out of the way. Goddard did not slacken his pace as he approached plaintiff until he got quite near to him, when, observing that plaintiff did not move, he pulled his horse to the right out of the track and the hind wheels of the buggy held the track and "slewed" forward, one of them striking plaintiff, causing the injury; there was evidence tending to show that it had rained that morning and that the track was wet, but it was not raining at the time of the accident, and the evidence tended to show that it had not rained after 9 o'clock.

It is urged: 1. That the evidence does not justify the verdict; 2. That the verdict (four thousand dollars) is grossly excessive; and 3. That the court erred in instructing the jury and its rulings upon evidence.

1. The court instructed the jury as follows: "There has been considerable evidence in this case in respect to the weather at or prior to the time of the injury in question, relative to the track, whether it was wet or not. In respect to that matter, I will instruct you that if you should find from the evidence that the driver of the defendant endeavored to avoid injuring the plaintiff by turning out of the railroad, roadbed, or place whereon he was driving, *and that, in consequence of the wet rails, or wet street, the wheels of the vehicle slipped, that such slipping would not conclusively repel any imputation of negligence.*" The words in italics present the part of the instruction claimed to be error. The court had just previously instructed the jury as to the definition of negligence and stated: "It [negligence] is always relative; that is to say, it depends entirely upon the nature of the situation and surroundings"; and the court followed the instruction complained of by the statement: "If the condition of the street is such that a prudent driver would exercise more care in driving through a public highway lest he should injure another, then the party driving is required to exercise such care; and that is what I mean by saying that negligence is relative in its character, depending

always upon the time, situation, and circumstances wherein the parties may be placed."

In the instruction complained of we think the court in effect instructed the jury that it cannot be said that the mere slipping of the wheels (if they find such slipping) as matter of law would repel the imputation of negligence. It was only another way of saying that the circumstances, if found to exist, would not justify a conclusive presumption, or show conclusively that there was no negligence. Such an instruction was proper and was not a violation of the constitutional prohibition to charge the jury with respect to matter of fact.

2. Upon some points the evidence was conflicting, but there was evidence tending to show that Goddard drove at considerable speed almost on to plaintiff before he pulled the horse out of the track, and that the injury was the result of want of ordinary care and prudence if not of recklessness on the part of the driver, and without the fault of the plaintiff, who was oblivious of his danger. We think there was evidence sufficient to justify the verdict.

3. Defendant devotes much attention to the claim of excessive damages, and counsel on both sides have brought to our attention, with much industry, a large number of cases bearing upon this question. The injury to plaintiff was serious and resulted in a permanent shortening of the broken leg and in rendering plaintiff less able than formerly to do a day's work; he had not entirely recovered at the time of the trial and was then suffering pain from the injury. The attending physician, Dr. Kenyon, testified: "My best impression is, that it does not seem to me that this man will ever be able to do a fair day's work; . . . it is now a year and a quarter since his injury, and he is not in a condition to-day to do that kind of work" (referring to such work as street sweeping). The rule in this class of cases has been many times stated in this court, and it is that while the verdict of the jury "is subject to review by the court, it will not be disturbed merely upon the ground that the damages are excessive, nor because the opinion of the court differs from that of the jury, but only where it appears that the excess has been given under the influence of passion or prejudice." (*Lee v. Southern Pac. R. R.*, 101 Cal. 118.) We

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cannot say that the verdict in this case was given under the influence of passion or prejudice.

4. The plaintiff was asked, and over defendants' objection was allowed to answer, the following question: "Have you earned any money since the accident, or been able to earn any money since?" It is urged that this was error because plaintiff's inability to earn money might have had no connection with the accident. I think it appears from the evidence of the plaintiff given before and after this question that it had reference to his condition as the result of the accident.

Discovering no reversible error, it is advised that the judgment and order be affirmed.

Gray, C., and Haynes, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are affirmed.

Harrison, J., Van Dyke, J., Garoutte, J.

Hearing in Bank denied.

[S. F. No. 1148. Department Two.—June 21, 1899.]

RAYMOND RIEGO, Assignee, etc., Respondent, v. SAMUEL FOSTER et al., Appellants.

ACTION BY ASSIGNEE IN INSOLVENCY—EVIDENCE OF AUTHORITY.—In an action by an assignee appointed under proceedings in involuntary insolvency against a partnership, to recover property assigned by the firm to the defendants, in violation of the insolvent act, within one month prior to the filing of the petition by the creditors, a certified copy of the assignment to the assignee is conclusive evidence of the right of the assignee to bring the action.

ID.—COLLATERAL ATTACK UPON CREDITOR'S PETITION.—Where the insolvency proceedings were regular on their face, they cannot be collaterally attacked by the defendants in an action by the assignee, upon the alleged ground that the signers of the petition were not actually creditors of the insolvents in the amount required by the Insolvent Act.

ID.—ORDER STRIKING OUT ANSWER—DEFINITENESS—PRESUMPTION UPON APPEAL.—Where the motion to strike out parts of the answer in

such action specifically quoted all the parts of the answer sought to be stricken out, and the court granted the motion as to all those parts of the answer which attack the validity of the insolvency proceedings, and denied it otherwise, the order, though it would be in better form if more fully identifying the part stricken out, is not too indefinite to be sustained, and it will be presumed upon appeal in favor of the judgment that the appellants were not deceived or prejudiced by the form of the order.

ID.—FINDINGS—CONSISTENCY—TRANSFER OUT OF USUAL COURSE OF BUSINESS—FREEDOM FROM ACTUAL FRAUD.—A finding, based upon an admission in the pleadings, that the transfer was not made in the usual and ordinary course of business, and that at the time thereof, defendants knew and had reason to believe that the firm was insolvent, and that the transfer was being made with intent to prefer certain creditors, represented by the defendants, and with a view to prevent the property from coming to the assignee in insolvency, et cetera, is not inconsistent with another finding that defendants were free from actual fraud, and believed their conduct to be lawful.

ID.—ACTUAL FRAUD IMMATERIAL.—Actual fraud is not an element in the case; and if the provisions of the Insolvent Act are violated, the transfer is void, regardless of any question of honesty and fairness, good faith, or actual fraud.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. J. C. B. Hebbard, Judge.

The facts are stated in the opinion of the court.

Edwin L. Forster and Albert J. Brunner, for Appellants.

A transfer out of the usual course of business is only *prima facie* evidence of fraud, and may be rebutted. (*Matthews v. Chaboya*, 111 Cal. 435, 438.) It is rebutted in this case by the finding that "defendants were free from actual fraud, and believed their conduct to be lawful." The court cannot, under the statute, hold the transfer void, merely because it was out of the usual course of business. (*Matter of Muller*, 118 Cal. 432, 436; *McNeil v. Hansen*, 115 Cal. 214; *Cook v. Cockins*, 117 Cal. 140; *Bernheim v. Christal*, 76 Cal. 567.) A judgment based upon contradictory findings is a "decision against law," requiring a new trial. (*Langan v. Langan*, 89 Cal. 186; 1 Hayne on New Trial and Appeal, sec. 1, p. 23.) The answer should not have been stricken out. The rule against collateral attack does not apply to strangers to the proceedings. (*Atkinson v. Allen*, 12 Vt. 619; 36 Am. Dec.

361; *Eureka etc. Works v. Bresnahan*, 60 Mich. 332; 1 Black on Judgments, sec. 260, p. 318; Randal's case, 2 Mod. 308.) The form of the order striking out part of the answer was too indefinite to settle the pleadings.

Barrett & O'Gara, for Respondent.

The judgment is supported by undenied allegations, regardless of the findings. (*In re Doyle*, 73 Cal. 570; *Ortega v. Cordero*, 88 Cal. 226.) The findings are not contradictory. The fraud found by finding 8 is upon the insolvent law; and actual fraud is not material, and was not in issue. (*Matthews v. Chaboya*, 111 Cal. 440.) Findings will not be declared contradictory, except where absolutely necessary. (*Schultz v. McLean*, 93 Cal. 329.) The attack in the answer upon the petition of the creditors was properly stricken out. The authority of the assignee or the existence or sufficiency of the debts of the petitioning creditors cannot be collaterally drawn in question in an action by the assignee. (Bump on Bankruptcy, 146; *Fitzgerald v. Neustadt*, 91 Cal. 600; *Livermore v. Swasey*, 7 Mass. 213; *In re Scrafford*, 14 Bank. Rep. 184; Fed. Cas. No. 12557; *Michaels v. Post*, 21 Wall. 398; *Chapman v. Brewer*, 114 U. S. 158-69; Van Fleet on Collateral Attack, sec. 532; *State v. Culler*, 18 Md. 418; *McKinney v. Crawford*, 8 Serg. & R. 351.) It must be presumed that defendants were not injured by the form of the order striking out part of the answer, they having had an opportunity to have it made more definite in the court below.

McFARLAND, J.—The plaintiff, as assignee in involuntary insolvency of Briare & Kenny, insolvent debtors, brought this action to recover the value of certain property alleged to have been assigned by said insolvents to the defendants within one month prior to the filing of the petition in insolvency, and in violation of section 59 of the Insolvent Act of 1895. Judgment went for plaintiff, and defendants appeal from the judgment.

The points made for reversal arise upon the pleadings and findings, and a short bill of exceptions showing a certain ruling of the court striking out part of the answer; no other

ruling of the court not shown by the judgment roll is before us, nor is any evidence brought up.

The petition of creditors to have the persons named declared insolvent, the decree adjudging them insolvent, and all the proceedings in insolvency down to and including the assignment by the clerk to the respondent, were regular on their face. But the appellants, in their answer in this present case, set up as a defense, among other things, that the signers of the petition were not actually creditors of the insolvents in the amount required by the act, and that therefore the proceedings were void and conferred no authority on respondent to maintain this action. On motion of respondent, the court struck out that part of the answer, and the principal contention of appellants is that this ruling was erroneous. This contention, however, cannot be maintained. Section 22 of the Insolvent Act expressly provides that: "In suits prosecuted or defended by the assignee a certified copy of the assignment made to him shall be conclusive evidence of his authority to sue or defend." (See *Fitzgerald v. Neustadt*, 91 Cal. 600; *Luhrs v. Kelly*, 67 Cal. 289.) Moreover, on principle and under the general authorities, the judgment of an insolvent court, regular on its face, like other judgments, cannot be thus collaterally attacked. In Bump's Notes of Constitutional Decisions, ninth edition, page 545, many authorities are cited to the principle, there stated, as follows: "Neither the validity of the adjudication of bankruptcy, nor the existence, sufficiency, or validity of the debt of the petitioning creditor, can be collaterally drawn in question. In all suits brought by an assignee, the assignment is conclusive evidence of his right to sue." In *Michaels v. Post*, 21 Wall. 398, (the United States supreme court states the principle (we quote from the syllabus) as follows: "If, on a petition and other proceedings regular in form, a decree in bankruptcy is made in such a case, and an assignee in bankruptcy is appointed in a way regular on its face, the decree of bankruptcy, though it be a decree *pro confesso*, cannot in a suit by the assignee to recover from a preferred creditor the property transferred, be attacked on the ground that the party petitioning had released his debt, was no creditor, that his petition was accordingly fraudulent and that the decree based on it was void."

We see nothing in the point that the order of the court below, striking out part of the answer, was too indefinite. The motion to strike out specifically mentioned and quoted all the parts of the answer which respondent sought to have stricken out; and the order of the court was that the motion "be and the same is hereby granted as to all those portions of the answer which attack the validity of the insolvency proceedings referred to therein; otherwise the motion is denied." It would have been better, perhaps, if the court had in its order quoted in full the parts intended to be stricken out, or had referred to them by line and page; but it clearly indicated what was meant, and we do not see how appellants could have been deceived or prejudiced by the form of the order; and, in the absence of any showing to the contrary, we will presume in favor of the judgment that appellants were not so deceived or prejudiced.

The contention of appellants that the judgment ought to be reversed because the seventh and the eighth findings are contradictory cannot be maintained. By the eighth finding the court found that the assignment and transfer were not made in the usual and ordinary course of business, and that at the time of the assignment defendants knew and believed and had reasonable cause to know and believe that the firm was insolvent, and that the transfer was being made with intent to prefer certain creditors represented by appellants, and with a view to prevent the property from coming to the assignee in insolvency, and to delay the operations and evade the provisions of the Insolvent Act, et cetera; and appellants contend that this finding is inconsistent with the latter part of finding 7, that "Defendants were free from actual fraud and believed their conduct to be lawful." "Actual fraud" was not an element in the case, and, "if the provisions of the Insolvent Act are violated, the transfer is void, and this is true regardless of any question of honesty and fairness, good faith or actual fraud." (*Matthews v. Chaboya*, 111 Cal. 440.) The finding of specific facts in finding No. 8 is not weakened by the finding in No. 7, touching the appellant's notion or belief as to the law. Moreover, the averments in the complaint of the facts found in finding No. 8 are not denied by the answer.

The judgment appealed from is affirmed.

Temple, J., and Henshaw, J., concurred.

[L. A. No. 413. In Bank.—June 21, 1899.]

J. W. LILIENTHAL et al., Respondents, v. S. D. BALLOU et al., Appellants.

PLEDGE OF MERCHANDISE BY PARTNERSHIP—ATTACHMENT—LEVIABLE

INTEREST OF PLEDGORS.—A transfer of a stock of merchandise by a partnership to trustees as security for the payment of the claims of certain attaching creditors, who released their attachments when the transfer was made, is in the nature of a pledge, dependent upon actual possession. If the pledge is valid, the firm, as the owner of the property, subject to the rights of the trustees for the creditors, has a leivable interest which may be reached by garnishment; and if it is not valid, the property itself may be seized upon attachment by another creditor of the firm.

ID.—STATUTE OF FRAUDS—DELIVERY AND CHANGE OF POSSESSION.—

In order to render such a pledge of the partnership property effective against seizure under an attachment by another creditor of the firm, the delivery to the trustees for the creditors must be as complete, and the actual change of possession as continuous and open, as is required in case of sales of personal property, by section 3440 of the Civil Code.

ID.—CONTINUANCE OF MANAGING PARTNER—INSUFFICIENT CHANGE OF

POSSESSION.—Where the agreement between the firm and the trustees for the creditors provided that the managing partner should be continued in employment, at a salary, subject to the supervision of the trustees, who did not take personal possession, and the business was continued under the control of the same manager, and with the same employees as before, and the conspicuous signs of the partnership were allowed to remain, with a small and less conspicuous sign added, containing the names of the trustees designated as successors to the firm, and the business continued to be advertised extensively in the name of the firm, there was no sufficient change of possession, to prevent seizure of the property under attachment by another creditor of the firm.

ID.—POSSESSION OF PLEDGORS—ATTACHED PROPERTY—EFFECTIVENESS

OF PLEDGE—ACTUAL CHANGE OF POSSESSION.—The fact the firm had no actual possession of the attached property, which was in the custody of the sheriff when the agreement for the pledge was made, does not affect the necessity for a transfer of possession of the pledged property, to complete the validity of the pledge. The pledge had no effectiveness until possession was given; and that possession, when given, must be actual, and not constructive, and a change thereof could not be effected by merely having the former owner manage the property as servant of the pledgee.

APPEAL from a judgment of the Superior Court of San Luis Obispo County and from an order denying a new trial. E. P. Unangst, Judge.

The facts are stated in the opinion of the court.

William Shipsey, for Appellants.

The transaction was a pledge, but was void for want of a delivery and change of possession. (Civ. Code, sec. 2988.) The transfer was void as to an attaching creditor, under the statute of frauds, for the same reason, independently of any honest intention of the vendor. (Civ. Code, sec. 3440; *Cahoon v. Marshall*, 25 Cal. 201; *Richards v. Schroder*, 10 Cal. 432; *Rothschild v. Swope*, 116 Cal. 670; *Laurence v. Burnham*, 4 Nev. 368.) Property, under attachment, must change possession when the attachment is released. (*Fitzgerald v. Gorham*, 4 Cal. 289; 60 Am. Dec. 616; *Richards v. Schroder*, *supra*; *Weil v. Paul*, 22 Cal. 492; *Rohrbough v. Johnson*, 107 Cal. 144; *Levy v. Scott*, 115 Cal. 43; *O'Brien v. Ballou*, 116 Cal. 318.)

W. H. Spencer, for Respondents.

There was sufficient evidence to show the delivery and change of possession, which was notorious, and known to the subsequently attaching creditor. (*Porter v. Bucher*, 98 Cal. 454; *Byrnes v. Moore*, 73 Cal. 393; 27 Am. St. Rep. 215; *Claudius v. Aguirre*, 89 Cal. 501.) Section 3440 of the Civil Code does not apply, because the sheriff had possession of the property when the agreement was made, and that section by its terms only applies to a transfer by a person "having at the time the possession or control of the property."

TEMPLE, J.—This is an action for the recovery of personal property, brought against the sheriff Ballou, and Orman, an attaching creditor. Defendants appeal from the judgment and from an order refusing a new trial. The property was levied upon under a writ of attachment against Phillips Brothers & Co.

On and prior to September 8, 1896, Phillips Brothers & Co. were engaged in merchandising at Arroyo Grande, in San Luis Obispo county. At that time their property was at-

tached by various creditors, and remained under attachment until October 23, 1896, when it was released in pursuance of an agreement made with all the creditors of the firm except Orman, and transferred to plaintiffs in trust for such creditors. The terms are expressed in the agreement. On the first day of December, 1896, Orman commenced suit to recover a debt due him from the firm, and the goods were levied upon, and the defense in this case consists of a justification under that writ. The question is, whether plaintiffs, under their transfer, can hold against Orman, who was a creditor of the firm before the goods were transferred and also prior to the attachments of the creditors for whom plaintiffs held as trustees.

Phillips Brothers & Co. is a partnership composed of Adolph Phillips and A. L. Phillips. Adolph Phillips had always been the managing partner, L. A. Phillips residing in San Francisco. The agreement was signed by Phillips Brothers & Co. and by sixty-one of their creditors and among other things provided in effect: 1. That the parties appoint plaintiffs trustees, "to receive, manage, operate, use, and dispose of all the aforesaid property of the aforesaid parties of the first part upon the terms and conditions hereinafter mentioned; 2. Parties of the first part will within thirty days convey to trustees all of their property except that which is exempt; 3. The trustees shall receive, manage, operate, use and conduct the merchandise business of said parties of the first part at Arroyo Grande, California, and all assets of property connected therewith, as they the said trustees shall deem meet and proper," with requisite authority, including power to replenish stock for cash from the receipts from the said business; 4. To collect debts due the firm and compromise claims; 5. To conduct the business for six months, and if then found unprofitable may terminate the trust and sell the goods at public or private sale; 6. All "recoveries" to be distributed through the board of trade to the undersigned creditors; 7. During all the time they conduct the business Adolph Phillips, one of the partners, "shall be employed by said trustees and shall give his exclusive time and services to said business, under the supervision of said trustees, and shall receive as remuneration and compensation for his services the sum of one hundred and twenty-five dollars per

month"; 8. Whenever the creditors receive fifty per cent of their claims and all costs, expenses, et cetera, "then this trust shall be terminated and all the aforesaid assets, property, and effects, or the replenishments remaining in the hands of the said parties of the second part, shall be transferred and surrendered unto the said parties of the first part or their nominees."

There were further enumerated conditions which I do not deem important here.

Transfers were made in pursuance of the agreement, and the goods were at once released from attachment, and the store was opened by Adolph Phillips, with the same employees which he had previously had, except the bookkeeper. The store buildings were marked very conspicuously with the signs of Phillips Brothers & Co., which were permitted to remain, but a new sign, much less conspicuous than the others, was put up containing the names of the trustees, and under the names the words, Trustees, Successors to Phillips Brothers & Co. The firm advertised quite extensively. After the transfer, as before, the business was advertised as that of Phillips Brothers & Co., without mention of any change. Money received was deposited in the county bank in the name of the trustees, and the old billheads and receipts were used—the names of the trustees being added by the use of a rubber stamp.

It is evident from the language of the agreement that the transfer to the trustees, who were simply the agents of the first attaching creditors, was for security only. It was not a sale or an absolute transfer of title, even if its validity be conceded. In no event was the property to become the property of the trustees, and they were never to have any rights with reference to it, except to have it sold and the proceeds applied to the payment of their debts, which still were to continue to exist as debts until they were paid or all the property had been sold and the proceeds applied in payment of the debts and costs.

Phillips Brothers & Co. still remained the owners of the property subject to the rights of the trustees to hold it as security, and still had a leviable interest in it, and the only question was, how the levy should be made. It was not a chattel mortgage under the statute, and, therefore, the statutory provisions in regard to levies upon personal property mortgaged do not apply. If it was a valid pledge, or

chattel mortgage dependent on possession, the goods could not be seized, but garnishment was the proper mode. If it was not a valid pledge it was properly attached, and the justification was fully made out.

A pledge is a deposit of personal property as security (Civ. Code, sec. 2986), and is dependent on possession, and is not valid until the property is delivered to the pledgee. (Civ. Code, sec. 2988.) The delivery must be as complete as is required in case of sales of personal property by section 3440 of the Civil Code, and change of possession must be continuous and open. (*George v. Pierce*, 123 Cal. 172.)

In the agreement it was stipulated that the business should be managed by Adolph Phillips under the supervision of the trustees, but the trustees not only did not take personal possession, but they could not take such possession until after the expiration of six months, for they were bound to carry on business for that length of time, and also bound to employ Phillips as manager. And in fact the business did go on as though nothing had happened under the management of Adolph Phillips, who had always been sole manager for the firm.

That this is not a sufficient change of possession is evident. No other authority is required except the case of *George v. Pierce, supra*. If in case of a sale there need not be an immediate delivery when the property is not in the possession of the vendor, that will not help plaintiffs here, for this was not a sale. If the debtors were not then in control of the property, they were in no condition to make a pledge, and in any event it would have no validity until possession was given, and that possession must not be constructive. A change of possession is not effected merely by having the former owner manage the property as the servant, agent or clerk of the pledgee. And this is especially so where there is so little outward sign of a change of ownership. Public policy requires a real and substantial compliance with the statute, and a failure should not be condoned for the hardships of a particular case.

The judgment and order are reversed and a new trial ordered.

Henshaw, J., Harrison, J., Garoutte, J., Beatty, C. J., and Van Dyke, J., concurred.

McFARLAND, J., dissenting.--I dissent and adhere to

the views expressed when the case was decided in Department, which need not be here restated. (*Lilienthal v. Ballou*, 55 Pac. Rep. 251.) The point upon which the majority decision seems to rest, that the transfer from Phillips Brothers & Co. to the plaintiffs was not an absolute sale, but was in the nature of a pledge, was not raised at the trial, and has no place in the transcript. The appellants defended under section 3440 of the Civil Code upon the theory that Phillips Brothers & Co. were in possession at the time of the transfer to the respondents, and that, therefore, if there was not an immediate delivery followed by an actual and continued change of possession, the attempted transfer was void, and the court so instructed the jury; but there was no question raised, so far as I can discover, about the character of the transfer touching the nature of the title or right which passed by it. It appeared that Phillips Brothers & Co. made an absolute deed of the real estate to the respondents and gave an absolute bill of sale of the personal property, and there was no question as to the transfer being a mere pledge. Moreover, section 3440 refers to "every transfer," without reference to the kind of title or right which passes by the transfer, and declares it void for want of change of possession only where the party making the transfer is in possession. In the case at bar, the jury must have found, under the instructions of the court, that Phillips Brothers & Co. were not in possession at the time of the transfer; and therefore section 3440 does not apply. *George v. Pierce*, *supra*, in my opinion, has no application to the case at bar; it was merely held in that case that there could not be a valid pledge of property without surrendering possession.

[S. F. No. 1436. In Bank.—June 21, 1899.]

CITY AND COUNTY OF SAN FRANCISCO, Appellant, v.
WILLIAM BRODERICK, Auditor, et cetera, Respondent.

DEPUTIES AND ASSISTANTS OF COUNTY CLERKS—CONSTITUTIONAL LAW—
LOCAL AND SPECIAL LEGISLATION.—The act of 1880 (Stats. 1880,
p. 20), in relation to deputies, assistants, and copyists of county
clerks, and providing for their appointment and compensation, in

any city and county having more than one hundred thousand inhabitants, and the act of 1891, amendatory thereof (Stats. 1891, p. 5), are in violation of section 5, of article XI, of the constitution, requiring the appointment and duties of officers to be regulated by general laws, and providing only for a classification of counties to fix their compensation, and of subdivision 28, of section 25, of article XI, of the constitution, forbidding local or special laws creating offices, or prescribing the powers and duties of county or municipal officers.

ID.—CONSTRUCTION OF COUNTY GOVERNMENT ACT—APPOINTMENT AND COMPENSATION OF DEPUTIES.—Section 61 of the County Government Act, allowing the appointment by certain county officers, including the county clerk, or as many deputies as may be necessary for the prompt and faithful discharge of the duties of his office, is to be construed in connection with section 216 of that act, providing that deputies employed shall be paid by their principals out of their salaries, unless in the act otherwise provided, and in connection with those provisions of the act which expressly limit the number of deputies allowed at fixed salaries payable out of the treasury in specified classes of counties.

ID.—UNCONSTITUTIONAL CONSTRUCTION—CONTROL OF COUNTY FUNDS.—The County Government Act cannot be construed as permitting the county clerk to make the compensation of any number of deputies that he may choose to appoint, a charge upon the county treasury, without violating section 13 of article XI, of the constitution, prohibiting the delegation, to any individual, of the control of any county money, property, or effects.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. J. C. B. Hebbard, Judge.

The facts are stated in the opinion of the court.

Harry T. Creswell, City and County Attorney, James L. Gallagher, successor, and W. I. Brobeck, Assistant, for Appellant.

The legislature cannot classify counties for any other than the sole purpose of fixing the compensation of officers (Const., art. XI, sec. 5; *Longan v. Solano County*, 65 Cal. 122; *Miller v. Kister*, 68 Cal. 142; *San Luis Obispo County v. Graves*, 84 Cal. 75; *Welsh v. Bramlet*, 98 Cal. 219; *Turner v. Siskiyou County*, 109 Cal. 332; *Bloss v. Lewis*, 109 Cal. 493; *Kahn v. Sutro*, 114 Cal. 316; *El Dorado Co. v. Meiss*, 100 Cal. 268; *Tulare Co. v. May*, 118 Cal. 303.) The acts in question are local and special, and based upon an arbitrary classification. The legislature cannot pass local or special laws, creating offices or prescribing the powers and duties of

county officers. (Const., art. IV, secs. 9, 25, 33; *Desmond v. Dunn*, 55 Cal. 242; *Earle v. Board of Education*, 55 Cal. 489; *Ex parte Giambonini*, 117 Cal. 574; *Darcy v. Mayor etc.*, 104 Cal. 642; *Denman v. Broderick*, 111 Cal. 103, 104; *Dwyer v. Parker*, 115 Cal. 544; *Rauer v. Williams*, 118 Cal. 402.) The county government act must be construed harmoniously. (*Donlon v. Jewett*, 88 Cal. 530; *Langenour v. French*, 34 Cal. 92; *Appeal of Houghton*, 42 Cal. 35; *Quick v. Whitewater*, 7 Ind. 570); and cannot be construed as violating the constitutional provision in regard to the control of county funds. (Const., art. XI, sec. 13; *Tulare v. May*, *supra*; *Dougherty v. Austin*, 94 Cal. 601.) If the county clerk chooses more deputies than those whose salaries are expressly provided for he must pay them out of his own salary. (County Government Act, sec. 216; *Farnum v. Warner*, 104 Cal. 679; *Tulare County v. May*, *supra*.)

Garret W. McEnerney, and Charles W. Slack, for Respondent.

The county clerk of San Francisco is a county officer in a county of the first class, under the County Government Act. (Stats. 1897, sec. 10, p. 453, sec. 157, p. 492; *Kahn v. Sutro*, 114 Cal. 316, 335; *Farnum v. Warner*, 104 Cal. 677, 678.) Conceding, for the purposes of argument, that the acts of February 14, 1891, and of April 2, 1880, standing by themselves, are unconstitutional, yet the legislature may refer to an unconstitutional statute "to indicate its will in respect to a constitutional purpose." (*People v. Bircham*, 12 Cal. 50, 55; *State v. Cincinnati*, 52 Ohio St. 419.) The legislature consequently might refer, and it did unquestionably refer, in the County Government Act, to these assumed unconstitutional statutes for the purpose of fixing the number and the amount of compensation of the deputies, clerks, and copyists of the county clerk.

A L. Hart and T. D. Riordan, Amici Curiae, also for Respondent.

HENSHAW, J.—This action was instituted to enjoin the auditor from allowing the demands of certain assistant register clerks and copyists appointed by the county clerk of the city and county of San Francisco. The auditor demurred to the petition, and his demurrer was sustained. The city and

county declined to amend, and a judgment of dismissal was entered. From that judgment this appeal is taken.

The principal question thus presented is not so much that of the power of the clerk to appoint as it is the duty of the city and county to pay the salaries of the appointees.

At the time when the present constitution took effect there were upon the statute books certain acts affecting the office of the county clerk of the city and county of San Francisco. These need not be particularized further than to state that they authorized the clerk to appoint certain deputy clerks, courtroom clerks, register clerks, assistant register clerks, record clerks, and copyists, with specified salaries for each, payable out of the treasury. Whatever may have been the effect of the present constitution upon these acts, it is conceded that the act of February 13, 1880 (Stats. 1880, p. 5), an act passed after the adoption of the present constitution, was a general act which revived and continued in force these earlier acts, and fixed the duties of the deputies and assistants appointed thereunder. Thereafter the legislature passed an act, entitled, "An act in relation to certain deputies (Stats. 1880, p. 20), section 1 of which provided: "In all cases in which by statutes in force on the thirty-first day of December, 1897, the county clerk of any city and county having over one hundred thousand inhabitants is authorized to appoint deputies, assistants, and copyists, in or in connection with the courts which are abolished by the constitution now in force, the county clerk may appoint four competent persons as such deputies, assistants, and copyists for each superior court, and where by law such superior court is entitled to more than one judge, he may appoint three persons as such deputies, assistants, and copyists for each additional judge; and such deputies, assistants, and copyists, so appointed, shall be entitled to the same compensation as is provided in said statutes, and the same shall be audited and paid at the same time and manner, and from the same sources, as is provided therein. He may also appoint such additional number of copyists as the duties of his office shall in his discretion from time to time require," et cetera. In 1891 the legislature passed an act amendatory to this last statute, entitled, "An act in relation to certain deputies, assistants, and copyists of county clerks, approved April 2, 1880." (Stats. 1891, p. 5.) This act was a re-enactment of the act of 1880, saving that its operation was limited to every city and county or county having over one hundred and twenty thousand inhabitants,

and it created the office of chief deputy clerk, at a salary of two hundred and fifty dollars per month.

It is not seriously questioned in this case but that these statutes last cited are in violation of the terms of the constitution, and void. Indeed, it cannot successfully be denied that such is the case. Section 5, article XI, of the constitution declares that "the legislature by general and uniform laws shall provide for the election or appointment in the several counties of boards of supervisors . . . county clerks . . . and such other county, township, and municipal officers as public convenience may require, and shall prescribe their duties, and fix their terms of office. Article IV, section 25, subdivision 28, of the constitution forbids the legislature from passing local or special laws "creating offices or prescribing the powers and duties of officers in counties, cities and counties, cities, township, election, or school districts." These acts are obnoxious to the constitution, then, in that they create offices and fix the duties of the officers in but one class of counties, which class is arbitrarily created and designated by population, notwithstanding the fact that the constitution declares that this shall be done only by general law, and that the counties of the state may be classified by population only for the purpose of fixing the compensation of their officers. (*Earl v. Board of Education*, 55 Cal. 489; *Rauer v. Williams*, 118 Cal. 401; see, also, *Farrell v. Trustees*, 85 Cal. 408.)

Notwithstanding the invalidity of these statutes, it is contended that the power to appoint these officers may be found in the County Government Act, itself admittedly a general law; that the County Government Act provides that in counties of the first class, to which San Francisco belongs, "the officers shall receive as compensation for the services required of them by law, or by virtue of their office, the salaries and fees fixed by law as compensation" (Stats. 1897, p. 188); and that reference may be had to these unconstitutional acts for the purpose of determining what salary is to be allowed (*People v. Bircham*, 12 Cal. 50; *State v. Cincinnati*, 52 Ohio St. 419). Section 61 of the County Government Act is the section containing the authority which it is contended authorized these appointments. It is a general section and reads as follows: "Every county, township, or district officer, except

a supervisor or judicial officer, may appoint as many deputies as may be necessary for the prompt and faithful discharge of the duties of his office. Such appointment must be made in writing and filed in the office of the county clerk, and until such appointment is so made and filed, and until such deputy shall have taken the oath of office, no one shall be or act as such deputy. (Stats. 1893, p. 367; Stats. 1897, sec. 59, p. 475.) This is certainly a grant of power from the legislature to the designated officers, authorizing them to appoint necessary deputies, but the question of the compensation of these deputies when appointed is quite a different matter. It does not follow that because deputies may be appointed, their salaries must be paid by the county. It will not seriously be contended that this permission which the legislature has accorded is to be construed into a power placed in the hands of these officers to appoint deputies at will, and make their salaries a charge against the counties. Such a construction would result in a grievous interference with the county funds, and would come clearly within the purview of section 13, article XI, of the constitution, which prohibits the legislature from delegating "to any 'individual' any power to make, control, appropriate, supervise, or in any way interfere with any county, city, town, or municipal improvement, money, property, or effects, whether held in trust or otherwise." (*Dougherty v. Austin*, 94 Cal. 601; *Tulare County v. May*, 118 Cal. 303.)

The County Government Act, as the constitution ordains, classifies counties by population for the purpose of fixing the compensation of its officers. It declares in section 216 (Stats. 1893, p. 507; Stats. 1897, p. 215) that "The salaries and fees provided in this act shall be in full compensation for all services of every kind and description rendered by the officers therein named, either as officers or *ex officio* officers, their deputies and assistants, unless in this act otherwise provided; and all deputies employed shall be paid by their principals out of the salaries hereinbefore provided, unless in this act otherwise provided." As to the payment of these officers and their deputies, a two-fold plan or scheme is provided by the act. In certain counties, as in counties of the first, second,

third, fifth, and other classes, the county clerk is allowed a salary for himself, and is given a certain number of deputies at fixed salaries payable out of the county treasury. In counties of the fourth, seventh, eighth, tenth, and other classes the county clerk is allowed a fixed amount, out of which he is required to pay all deputies, as well as himself. By both of these systems a fixed and determinate amount only can be drawn from the treasury in payment of the salaries of the chief official and his deputies. Both of these salary schemes have been upheld. (*Farnum v. Warner*, 104 Cal. 679; *Tulare County v. May*, *supra*.) If this limitation were not imposed, and if the officers were allowed to appoint deputies at will, making their salaries a charge upon the treasury, the scheme itself would be in violation of the provisions of the constitution above quoted. (Const., art. XI, sec. 13.) But it is precisely this which it is contended that the county clerk of the city and county of San Francisco can do; that he may appoint at will such deputies and assistants as he deems necessary under the provisions of section 61 of the County Government Act, and these appointees in turn may compel payment of their salaries out of the county treasury. But this may not be done. The county clerk of the city and county of San Francisco by the act of February 13, 1880 (Stats. 1880, p. 5), is given a fixed salary, and is allowed a fixed number of deputies and assistants, whose compensation is a charge upon the treasury. He has the power under section 61 of the County Government Act to appoint additional deputies and assistants if the needs of his office so require, but in the present condition of the law the compensation of these extra assistants and deputies must be paid for by himself.

The judgment is, therefore, reversed, with directions to the trial court to overrule the auditor's demurrer.

Temple, J., Harrison, J., Garoutte, J., Van Dyke, J., and Beatty, C. J., concurred.

McFarland, J., dissented.

Rehearing denied.

[Sac. No. 655. Department One.—June 21, 1899.]

In the Matter of the Estate of SOLOMON RUNYON, Deceased. E. DANN and N. ANDERSON, Executors, Appellants, v. ELMINA A. RUNYON, et al., Respondents.

ESTATES OF DECEASED PERSONS—COMPENSATION OF EXECUTOR FIXED BY WILL—EXTRA SERVICES—RENUNCIATION OF WILL.—A will fixing the compensation of an executor in an amount in excess of his legal fees must be deemed to fix the measure of his compensation for all services of every kind to be rendered by him; and no claim for extra services, however beneficial to the estate, can be allowed to the executor, unless he has, by a written instrument, filed in court, renounced the provision of the will for compensation, as provided in section 1616 of the Code of Civil Procedure.

APPEAL from an order of the Superior Court of Sacramento County settling the account of an executor, and disallowing an item for extraordinary services. Joseph W. Hughes, Judge.

A. P. Catlin, for Appellant.

Ora Runyon Buckman, for Respondent.

HARRISON, J.—Appeal from an order settling the annual account of the executors, and striking therefrom an item of \$1,226.86 for extraordinary services claimed to have been rendered by one of the executors.

The appellants are the executors of the last will and testament of the deceased, and in his will appointing them he made the following provision in reference to their compensation: "In lieu of the commissions allowed by law for executors, which I deem insufficient, I do hereby provide that my said executors shall be entitled to receive the sum of five thousand (5,000) dollars each as and for full compensation for their services respectively as such executors, in addition to their actual expenses." Neither of the executors filed a renunciation of his claim for compensation provided by the will.

The personal estate of the testator was valued in the inventory returned by them at the sum of \$245,405, and the real estate at \$99,500; and in the account presented by them for settlement it appears that the estate of the decedent accounted

for by them amounts to \$422,244. The real estate consisted of four farms, not adjoining each other, and aggregating about 1,650 acres, the most distant being about eighteen miles apart. A portion of this land was planted to fruit trees and devoted to the culture and production of fruit, and a portion was rented to tenants. One of the executors — Dann — had been in the service of the testator for upward of ten years prior to his death, at a salary of \$100 per month, as the active manager of all his farming operations, both in the culture of fruit and other produce, and upon the death of the testator the executors deemed it for the advantage of the estate that he should continue in this management; and he thereupon continued to manage the farms and business connected therewith. It is for this management that his claim for extraordinary services was made, computed at the rate of \$100 per month. The court finds that Mr. Dann was well qualified to perform these services, and that they were beneficial to the estate, and that the income of the estate was increased thereby, and also that the services were not such as were incumbent upon him in the common course of his duties as executor.

Section 1616 of the Code of Civil Procedure provides that the executor "shall be allowed . . . for his services such fees as are provided in this chapter; but when the decedent by his will makes other provision for the compensation of his executor, that shall be a full compensation for his services, unless by a written instrument filed in the court he renounces all claim for compensation provided by the will." As no renunciation of the claim for the compensation provided by the will was filed by either of the executors, the court was required, under this section, to hold that the provision thus made was a "full compensation for his services," and to deny him his claim for any further allowance for extraordinary services. It will be observed that the amount of compensation provided in the will is largely in excess of the commissions to which the executors would have been entitled if no provision had been so made, and it is reasonable to suppose that when the testator appointed the manager of his farms to be one of his executors he had this fact in mind, and made the appointment in order that after his death his estate might continue to receive the benefit of his services and experience as such

manager, and that he fixed the amount of his compensation in contemplation thereof. The statement in his will that he deemed the commissions allowed by law to be insufficient compensation implies that he expected that they would perform other duties than those ordinarily required of an executor.

We cannot assent to the proposition of the appellants that the provision in section 1618 of the Code of Civil Procedure, "In all cases such further allowance may be made as the court may deem just and reasonable for any extraordinary services"—authorized the court to disregard the provisions of section 1616. The cases here referred to are those provided in the first sentence of the section, viz., "when no compensation is provided by the will of the executor renounces all claim thereto." The amount provided by the will must be taken as the measure of compensation which the testator deemed ample for all services to be rendered in the execution of the trust, and if the executors, either upon assuming their office, or by reason of unexpected circumstances occurring during the course of their administration of the trust are called upon to perform extraordinary services, they must first renounce the compensation provided by the will before they can be entitled to any allowance for such additional services. The compensation of an executor, whether according to the rates fixed by the statute, or as determined by the testator, is not a gratuity, but is in consideration of the services he may render, and the amount fixed by the statute is deemed ample compensation for the services ordinarily required. If the executor would claim that his services entitle him to a greater compensation than that allowed by the statute, he must first renounce that provided by the will, and the court can then make him such allowance as will fully compensate him. Unless such renunciation is made, the provision in the will will be held under section 1616 to be "full compensation" for his services.

The right of an executor to receive compensation for extra services, in addition to the statutory allowance, was very fully considered in *Collier v. Munn*, 41 N. Y. 143. In that case one of the executors was an attorney-at-law, and

at the request of his coexecutors, and upon their agreement with him that he should be compensated therefor, he rendered services as an attorney in certain important litigation for the protection of the estate, which were of great value and advantage to the estate. The court held, however, that, notwithstanding the services rendered did not devolve upon him as executor, and were not such as could be required of him by virtue of his office, he was not entitled to any compensation therefor; that the commissions allowed by law must be his entire compensation for all the services rendered by him in the discharge of his trust.

The order is affirmed.

Garoutte, J., and Van Dyke, J., concurred.

[L. A. No. 563. Department One.—June 22, 189.]

R. H. KNIGHT et al., Appellants, v. ROSA L. WHITMORE, Respondent.

CONTRACT PLEADED IN ANSWER—ADMISSION OF GENUINENESS AND DUE EXECUTION—EVIDENCE—AUTHORITY OF AGENT OR PARTNER.—The genuineness and due execution of a contract, a copy of which is fully set forth in the answer, with the signatures thereto appended, must be deemed admitted for all the purposes of the trial, if not denied by affidavit, as provided in section 448 of the Code of Civil Procedure. Such contract need not be formally offered in evidence, nor its execution proved, nor need the authority be established of an agent or partner purporting to sign the names of the plaintiff's thereto.

ID.—ACTION FOR LEGAL SERVICES—GENUINENESS OF CONTRACT IN FORMER FIRM NAME—DISSOLUTION OF FIRM—OBLIGATION OF REMAINING PARTNERS.—In an action by two partners, to recover for legal services, where the genuineness and due execution of a written contract pleaded in the answer, which was signed in the name of a former firm, of which they were members, by a former partner, is admitted by failure to deny the same by affidavit, the plaintiffs are bound thereby individually after dissolution of the former firm, and cannot charge for subsequent services contrary to its terms, in the absence of clear proof that the written contract was displaced by a second agreement.

ID.—PERFORMANCE OF SERVICES UNDER CONTRACT—PLEADING—EVIDENCE—WAIVER OF OBJECTION.—Where the answer pleading the contract sets out matters fairly the equivalent of an allegation that the services of the plaintiffs were performed thereunder, and evidence to that effect was admitted without objection, the absence of a formal allegation to that effect is immaterial.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order denying a new trial. Walter Van Dyke, Judge.

The facts are stated in the opinion of the court.

Knight & Harpham, for Appellants.

J. G. Rossiter, and Goodrich & McCutchen, for Respondent.

GAROUTTE, J.—Plaintiffs have brought this action to recover for legal services, and, judgment going against them, have appealed to this court. They rely upon an alleged oral contract of hiring. As defense the defendant set out an agreement in writing, which is in the following language:

“Pasadena, Cal., April 8, 1895.

“In the Matter of the Estate of George S. Foster, Deceased—
Agreement as to compensation.

“We do hereby agree with Mrs. Rosa L. Whitmore, administratrix of said estate that we will proceed immediately with the above estate in the superior court, and will push the same as fast as possible, and will pay all extra costs in said case occasioned by an error upon our part; and when the case is entirely completed and the property distributed, and she is properly discharged as such administratrix, she shall determine for herself what our compensation as attorneys shall be, and we will make no charge or demand against her or said estate for our services as attorneys.

“(Signed) KNIGHT, SIMPSON & HARPAM,

“By C. M. Simpson.”

The aforesaid agreement was not denied by affidavit, as provided in section 448 of the Code of Civil Procedure; therefore its genuineness and due execution must be deemed admitted for all the purposes of the trial. (*Moore v. Copp*, 119 Cal. 429.)

Simpson was a member of the legal firm of Knight, Simpson & Harpham for a year immediately prior to April 1, 1895, but it is now claimed by plaintiffs that this firm was dissolved upon said April 1st, and that, therefore, Simpson had no authority to bind them by the contract he entered into in behalf of the firm with defendant. It is somewhat

strange that a member of the bar should enter into a contract purporting to bind a firm of which he had been a member, and which had been in existence at a very recent date, if the firm was not in existence at the time the contract was made. This fact alone might be deemed sufficient to create a conflict in the evidence upon the question as to whether or not the firm of Knight, Simpson & Harpham was dissolved in fact at the time this contract was entered into. But we need not rest alone upon this proposition. The contract upon its face shows that Knight, Simpson & Harpham agreed to perform the services specified without charge or demand against defendant or said estate. Plaintiffs admit the genuineness and due execution of this contract. Such admission carries with it the genuineness of the signatures and the fact of its execution, and also necessarily the further fact that Simpson had authority to sign the names of these plaintiffs to the document. It follows therefrom that this contract bound plaintiffs to do this work equally with Simpson, and they could not evade the force and effect of its provisions by a dissolution of the firm after that time. If such a firm was in existence, they were bound as a firm. If it was thereafter dissolved, they were bound individually. Even conceding that plaintiffs alone did all the work it makes no difference. It would require every clear evidence to indicate that there was a second contract entered into by plaintiffs with defendant, under which they performed this labor, and that this written contract was displaced thereby. The jury declared to the contrary, and we are entirely satisfied with the view they took of the facts.

The trial court refused to give the jury the following instruction: "The jury are instructed that the only effect of the failure to deny under oath the contract of April 8, 1895, is to admit its due execution and genuineness, but does not dispense with its introduction in evidence, and that, as the defendant did not offer the contract in evidence, the jury are not to take the same into consideration in forming their verdict in this case." This instruction was properly refused. The writing having been set out in the pleading and its genuineness and due execution having been admitted, a formal offer in evidence of the original document was not necessary.

(*Rosenthal v. Merced Bank*, 110 Cal. 198; *Brooks v. Johnson*, 122 Cal 570.)

The point is made that there is no allegation in the affirmative defense alleging that the services performed by plaintiffs were performed under the said written contract. Even conceding such an allegation necessary, we deem the matters set out are fairly the equivalent of such an allegation, and evidence was introduced to that effect without objection.

There is no merit in the remaining questions raised by the appeal.

For the foregoing reasons the judgment and order are affirmed.

McFarland, J., and Harrison, J., concurred.

[S. F. No. 1568. Department Two.—June 22, 1899.]

J. B. WALLER, Respondent, v. F. F. WESTON, Appellant.

FORECLOSURE OF MORTGAGE—SERVICE OF SUMMONS—FALSE RETURN—VACATION OF JUDGMENT—IMPROPER CONDITION AS TO COSTS.—The defendant in an action to foreclose a mortgage, who was not served with summons, and against whom a false return of service thereof was made, has an absolute right, upon application within six months after entry of the judgment of foreclosure, and upon proof of the facts, to have the judgment vacated for want of jurisdiction, and the service of the summons quashed. The court has no power to impose costs as a condition to the vacation of the judgment; as the application is not made under section 473 of the Code of Civil Procedure, but is for the setting aside of a judgment which is void for want of jurisdiction.

ID.—KNOWLEDGE OF SUIT IMMATERIAL.—Actual knowledge by the defendant of the suit against him is immaterial, and cannot be the equivalent of legal service of the summons upon him, or require him to appear in the action, or warrant the court in entering judgment against him for failure to appear.

ID.—IMPROPER FINDINGS—MOTION TO STRIKE OUT.—The court cannot properly make findings of fact and conclusions of law, unless issues are joined, and a trial thereof is had; and they have no proper place in an action to foreclose a mortgage, in which there is no appearance of the defendant, and, if made, should be stricken out upon motion.

APPEAL from orders of the Superior Court of Contra Costa County imposing costs as the condition of vacating

a judgment, denying the motion to vacate it for failure to comply with the condition, and refusing to strike out findings. Joseph P. Jones, Judge.

The facts are stated in the opinion of the court.

Fitzgerald & Abbott, for Appellant.

John T. Pidwell, and Black & Leaming, for Respondent.

HENSHAW, J.—F. F. Weston was defendant in an action to foreclose a mortgage. Summons was issued, and a return made by the sheriff showing personal service upon him. Upon his failure to answer, judgment was taken against him and a decree of foreclosure entered. A sale was had and a deficiency judgment docketed. The judgment was entered on the sixteenth day of October, 1897, and on the fifteenth day of February, 1898, Weston gave notice of his motion, supported by affidavits, to set aside the default and judgment and quash the service of summons, upon the ground that service of summons had never been made upon him, and that the court had never obtained jurisdiction over him. Upon the hearing, it seems to have been satisfactorily established that the defendant had never been served in the action, but that the sheriff by mistake had served his brother in his stead. After hearing, the court made a conditional order vacating the judgment and quashing service of the summons, provided that defendant pay to plaintiff within ten days the sum of one hundred and nine dollars. The defendant refused to comply with the terms of the order imposing costs as a condition to the vacation of the judgment.

This provisional order vacating the judgment and quashing service of summons upon terms was made upon April 1, 1898. After Weston's refusal to comply with its conditions the court, upon the twenty-fifth day of April, 1898, made and filed certain findings of fact, conclusions of law, and a so-called judgment, by which last order or so-called judgment the minute order of April 1, 1898, and Weston's refusal to comply with its terms being recited, his motion was denied absolutely. Defendant moved to strike from the files the so-called findings of fact and conclusions of law, which motion was also denied. He then appealed from the

minute order of April 1, 1898, vacating and setting aside the judgment and quashing service of summons provisionally and upon terms; from the so-called judgment and order of April 25, 1898, finally and absolutely denying his motion; and from the minute order of April 25, 1898, denying his motion to strike out the findings of fact and conclusions of law.

Appellant's motion was made, not upon the ground that the judgment had been taken against him through mistake, surprise, or his excusable neglect, but solely upon the ground that he had not been served with process at all. In making its conditional order quashing service of summons the court must have determined the fact to be in accordance with appellant's contention. Such being the case, appellant was not a suitor before the court under section 473 of the Code of Civil Procedure, seeking relief from his own error or mischance, and becoming entitled to such relief only by compliance with such proper terms as the court might exact; he was not seeking to be permitted upon terms to come in and answer; he was before the court insisting that it had never obtained jurisdiction over him, and that a judgment against him, void for want of jurisdiction, should be set aside. His case is like those considered in *Norton v. Atchison etc. R. R. Co.*, 97 Cal. 388, 33 Am. St. Rep. 198, and *Mott Iron Works v. West Coast Plumbing Co.*, 113 Cal. 341. Knowledge—even actual knowledge of the suit against him—was not the equivalent of legal notice and process, and did not make it compulsory upon him to appear in the action, or warrant the court in entering judgment against him for his failure so to do. (*In re Central Irr. Dist.*, 117 Cal. 382.) Under these circumstances, it was not within the power of the court to impose terms upon him as a condition to granting him an absolute right. For the right was absolute if the application for relief was timely presented. The motion was made within six months after the entry of judgment, and this is sufficient. (*People v. Temple*, 103 Cal. 447; *People v. Dodge*, 104 Cal. 487; *Young v. Fink*, 119 Cal. 107.)

The foregoing renders unnecessary any especial consideration of the second order wherein the rule was made absolute upon appellant's refusal to comply with the terms. As it was

error for the court to impose terms, the later order must fall with that determination.

Upon the appeal from the court's refusal to strike out its findings of fact and conclusions of law, it may be said that the issues of fact upon which findings are permitted or required are those specified in section 590 of the Code of Civil Procedure. Sections 632 and 633 of the same code provide that upon the trial of a question of fact by the court, and in giving its decision, the facts found and the conclusions of law must be separately stated, and judgment upon the decision must be entered accordingly. Notwithstanding the somewhat hasty declaration to be found in the very early case of *Semple v. Burkey*, 2 Cal. 321, it is contemplated by our law that findings of fact shall be made only upon issues joined by the pleadings under section 590 of the Code of Civil Procedure, where the decision of the court following the findings is a judgment. Findings of fact and conclusions of law, therefore, had no proper place in this proceeding.

The orders appealed from are reversed.

McFarland, J., and Temple, J., concurred.

[S. F. No. 894. Department One.—June 23, 1899.]

S. CLARKE PORTER Respondent, v. VICTORIA ELIZALDE, Appellant.

ATTORNEY AND CLIENT—AUTHORITY OF ATTORNEY TO EMPLOY ASSISTANT COUNSEL.—An attorney-at-law has no general authority, by virtue of his retainer, to employ counsel or assistants at the expense of his client, without the client's previous authority or consent.

ID.—UNDERSTANDING OF ASSISTANT—DECLARATION OF ATTORNEY.—The liability of the client to compensate the assistant employed by his attorney cannot be established by the evidence of the assistant that it was his understanding that the attorney represented his client; nor can authority from the client, not in fact possessed by the attorney, be established by the declarations of the attorney.

ID.—ACCEPTANCE OF SERVICES—IMPLIED OBLIGATION—EXCEPTION TO RULE—AGREEMENT OF ATTORNEYS TO PAY EXPENSES.—The general rule that the acceptance of the services of another without objection implies an obligation to pay their reasonable value, is not uniform or absolute, but its application depends upon the circumstances of the case; and it does not apply in case of the

mere acceptance of the services of assistant counsel, employed without the previous authority or consent of the client, by attorneys with whom the client has an agreement for compensation, covering the whole cause, and the payment of all the expenses of the litigation by them.

ID.—STATEMENT OF ASSISTANT COUNSEL IN ARGUMENT TO JURY—ESTOPPEL.—A statement made by the assistant counsel in the argument to the jury, in support of the contest of a will, that the contestant would pay all the attorneys' fees in the case, did not call for the expression of any dissent, and could not create an estoppel by silence of the contestant, to dispute the obligation to pay the fees of the assistant counsel.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. J. C. B. Hebbard, Judge.

The facts are stated in the opinion of the court.

Edward P. Cole, and Graves & Graves, for Appellant.

Sidney M. Van Wyck, Jr., for Respondent.

HARRISON, J.—The plaintiff recovered judgment against the defendant upon an action assigned to him by Mr. James L. Crittenden for services rendered as counsel upon the trial of a contest of the will of her husband. A motion for a new trial was made upon the ground that the finding by the court of an employment by her of Mr. Crittenden was not sustained by the evidence. The motion was denied, and the defendant has appealed.

The defendant had filed a contest against the probate of her husband's will in the county of Santa Barbara, and for that purpose had employed as her attorneys Messrs. Graves & Graves and Mr. John J. Boyce, upon an agreement with them that they would advance and pay all the costs and expenses to be incurred in the contest, and that, if successful, she would transfer and convey to them one-half of the property she might recover thereby. Some months after this contest had been filed Mr. Ernest Graves employed Mr. Crittenden to assist him at the trial of the contest, and in pursuance of the employment Mr. Crittenden attended at the trial and acted as leading counsel therein. The trial lasted about two weeks, and resulted in a verdict in favor of the contestant. Mr. Crittenden had no interview with the defendant until he

went to Santa Barbara a day or two before the trial began, nor did the defendant know until that time that he was to have anything to do with the case. He was then introduced to her by Mr. Graves as the gentleman who was coming there to assist in the trial. After his arrival at Santa Barbara he discussed the case with her, the evidence that could be given, and who were her witnesses, and from that time on through the trial had frequent interviews with her concerning the testimony and witnesses, and also with the witnesses in the case—usually in company with Mr. Graves, or Mr. Boyce, or both. Mr. Crittenden never had any conversation with her about the terms of his employment, except that he told her at the time of his introduction to her that he was employed to try the case. Nor did he at any time say anything to her, or she to him, on the subject of his compensation, or by whom he was to be paid. Neither did he at any time say anything to her about paying him for his services, until the day the present action was commenced—about two years after the trial of the contest—when he sent her a telegram requesting payment, to which she replied by directing him to see Mr. Graves about it. When Mr. Crittenden was employed he was informed by Mr. Graves that his fee in the matter was contingent upon success, and, although no definite amount was agreed on as his compensation, a sum was named which was satisfactory to both. He was also informed that Mr. Graves was to pay all the expenses of the litigation, and Mr. Graves did in fact pay Mr. Crittenden's expenses at Santa Barbara during the trial of the contest. Nothing was said by Mr. Graves as to who was to pay Mr. Crittenden, but on one occasion after the trial he requested payment from Mr. Graves. It is not claimed that there was any direct employment of Mr. Crittenden by the defendant, and he testified that it was his understanding that his employment was by Mr. Graves as her agent. There was no evidence that Mr. Graves was ever authorized by her to employ him, and the defendant testified that she never employed him as her attorney or authorized anyone to employ him on her behalf, and Mr. Graves testified that he had no authority from the defendant to employ Mr. Crittenden, but that he employed him upon his own account, and that the understanding between them was that he would

pay him when the estate was distributed and he received his contingent fee.

Upon this evidence the court was not justified in finding that the services of Mr. Crittenden were rendered to the defendant at her special instance and request, or that he was employed by her as counsel upon the trial of the contest. An attorney-at-law has no general authority by virtue of his retainer to employ counsel or assistants at the expense of his client without previous authority or assent on the part of the client. (*Paddock v. Colby*, 18 Vt. 485; *Young v. Crawford*, 23 Mo. App. 432; *Voorhies v. Harrison*, 22 La. Ann. 85; *Mechem on Agency*, sec. 813; *Weeks on Attorneys*, sec. 246.) The statement of Mr. Crittenden that it was his understanding that Graves represented the defendant is insufficient to render the defendant liable. The authority of an agent cannot be established by his own declarations in the face of evidence that he had no authority.

The respondent contends, however, that the appellant is liable for the value of the services rendered by reason of having accepted them without objection; that, as she was present at the trial and made no objection to having Mr. Crittenden act in her behalf therein, she is under an implied obligation to pay their value. It is undoubtedly in general the rule that when one knows that another is rendering him services, and tacitly assents thereto, if nothing more appears the law will imply a provision on his part to pay for such services. The rule is not uniform or absolute, however, but will be recognized or refused according to the circumstances of the particular case in which it is invoked (see *Moulin v. Columbet*, 22 Cal. 508); and when it appears that the services were rendered under an express employment by an agent, or by a third person who assumed to act in the interest of the one in whose behalf they were rendered, the authority of that person and the terms of the employment become important factors in determining the liability or the right of recovery. The mere silence of the party will not be held to constitute such assent or acquiescence in the acts of the agent as to amount to a ratification or adoption of these acts, without also considering the circumstances under which the silence existed. Especially in a case like the present, where there

was no authority in the defendant's attorney to engage counsel at her expense, and where he had agreed with her to pay all the expenses of the litigation, will the law refuse to imply from her mere silence a promise to pay for the services rendered under such employment. In *Price v. Hay*, 132 Ill. 543, it was held that the acquiescence of a client in the appearance of an attorney and performance of services by him in the case is not legitimate evidence from which a jury may infer an implied contract between them to pay for such services, where the client has previously employed other counsel therefor at a fixed fee. Similar rulings have been made in *Holmes v. Board of Trade*, 81 Mo. 137; *Young v. Crawford*, *supra*; *Savings Bank v. Benton*, 2 Met. (Ky.) 240; *Evans v. Mohr*, 153 Ill. 561; *Ennis v. Hultz*, 46 Iowa, 76.

The respondent has cited certain cases in support of his contention, but in each of the cases where this question was presented for decision there was some controlling circumstance upon which the court relied to determine the liability of the client. In *Briggs v. Georgia*, 10 Vt. 68, the attorney who had the management of the suit was the agent of the town, as well as its attorney-at-law, and in *Paddock v. Colby*, *supra*, this fact was alluded to by the court as distinguishing the case from the general rule that an attorney cannot employ counsel at the expense of his client without his consent. In *King v. Pope*, 28 Ala. 602, the attorney had informed the client of the employment of counsel, and he not only expressed no dissent but afterward conferred with him about the case at the trial. In *Jackson v. Clopton*, 66 Ala. 29, the liability of the client was placed upon his "recognition of the relationship during the progress of the trial." In *Hogate v. Edwards*, 65 Ind. 373, the liability of the client was maintained upon the ground that his conduct at the trial amounted to a ratification of the employment by his attorney. In none of these cases had the attorney made an agreement with the client to pay all the expense of the litigation. In *Ennis v. Hultz*, *supra*, where there was an agreement between the client and his attorney for a contingent fee, the court said: "The plaintiff in the case at bar cannot be allowed to say that the defendants looked on and saw him do work for them, and therefore impliedly agreed to pay him because the plaintiff

had an express contract with Dixon," and distinguishes the case from *McCrary v. Ruddick*, 33 Iowa, 521, cited by the respondent herein, in that in the earlier case McCrary was employed by one of the codefendants in the action, and the facts were such that he had the right to assume that he was employed by all of the defendants.

It was testified herein that in his argument to the jury Mr. Crittenden stated that the contestant, the defendant herein, would pay all the attorneys' fees in the case; that she was present at the time, and neither then nor at any subsequent time repudiated or disputed this statement; and this fact is relied upon by the respondent as a reason for holding her liable herein.

It is only upon the ground of an estoppel that she can be held liable by reason of not having disputed this statement, and it is manifest that there are here no elements of an estoppel. It was not a case where she was under any obligation to deny the statement, nor was the statement made with any view to obtain an assent or dissent from her, upon which Mr. Crittenden was to determine his course of action. Moreover, the place and conditions under which the statement was made were not such as to permit her to express any dissent. (See *Wilkins v. Stidger*, 22 Cal. 231; 83 Am. Dec. 64.)

The judgment and order denying a new trial are reversed.

Van Dyke, J., and Henshaw, J., concurred.

Hearing in Bank denied.

CXXV. CAL.—14.

[Sac. No. 516. Department One.—June 23, 1896.]

ALFRED DAVIS, Appellant, v. C. A. POST, Auditor, Respondent.

COMPENSATION OF SUPERVISORS AS ROAD COMMISSIONERS—REPEAL OF CODE PROVISION—COUNTY GOVERNMENT ACT—CONSTITUTIONALITY—MANDAMUS.—Section 2641 of the Political Code, regulating the compensation of supervisors as *ex officio* road commissioners, as amended March 9, 1893, was repealed by those provisions of the County Government Act, passed March 24, 1893, which were inconsistent, therewith, and to which there is no valid constitutional objection; and mandamus will not lie to compel the issuance of a warrant based upon that section of the Political Code, regardless of whether such compensation is now governed by section 195 of the County Government Act of 1893, or by section 191 of the County Government Act of 1897, to which constitutional objections are urged, which are not passed upon.

APPEAL from a judgment of the Superior Court of Stanislaus County. William O. Minor, Judge.

The facts are stated in the opinion of the court.

T. J. Hazen, for Appellant.

Subdivision 15 of section 191 of the County Government Act of 1897 is invalid, because not constitutionally passed, as shown by the journals of the senate and assembly, which may be consulted by the court. (*Oakland Paving Co., v. Hilton*, 69 Cal. 500; 513; *Gardner v. Collector*, 6 Wall. 511; *County of San Mateo v. Southern Pac. R. R. Co.*, 13 Fed. Rep. 766; *South Ottawa v. Perkins*, 94 U. S. 260; *Post v. Supervisors*, 105 U. S. 667.) The County Government Act of 1897, and that of 1893, as respects the compensation of supervisors as road commissioners, are both unconstitutional and void, as being local and special legislation, providing rules for different counties, in an arbitrary and capricious manner, and taking effect at different times in different counties. (*Miller v. Kister*, 68 Cal. 142; *Darcy v. San Jose*, 104 Cal. 642; *Denman v. Broderick*, 111 Cal. 96; *People v. Johnson*, 95 Cal. 471; *State v. Boice*, 140 Ind. 506.) Section 2641 of the Political Code has not been repealed, and governs this case.

L. W. Fulkerth, for Respondent.

The journals of the legislature, if consulted, will show

that subdivision 15 of section 191 of the County Government Act of 1897 was constitutionally enacted. Neither section 191 of that act nor section 195 of the County Government Act of 1893 is local or special. The counties were properly classified for the regulation of the compensation of officers in the different classes. (*Longan v. Solano County*, 65 Cal. 122; *Hale v. McGettigan*, 114 Cal. 112.) Section 2641 of the Political Code is not in force, and cannot be the basis of a *mandamus* to the auditor.

GAROUTTE, J.—The opinion of the trial court in this case is clear, concise, and conclusive upon all the questions involved in this appeal, save a single one, and that question is now raised for the first time. The opinion is as follows:

"This is an application for a writ of mandate to compel the defendant, the county auditor, to draw his warrant in favor of the plaintiff for the sum of thirty-four dollars and twenty cents claimed by plaintiff to be due him for mileage as road commissioner, for the month of April, 1897. On the argument the contention of the plaintiff was that he was entitled to receive for his services as road commissioner twenty cents a mile, not exceeding in any year three hundred dollars, as provided by section 2641 of the Political Code, as amended in 1893; while defendant claimed that plaintiff is entitled to receive only his actual expenses while supervising the roads of his district, not exceeding ten dollars in any one month, as provided by subdivision 15 of section 191 of the county government law of 1897. The county government law of 1897 being the latest enactment on the subject, must control, if it be a valid law. But plaintiff contends that section 191 was never passed by the two houses of the legislature, that the court can examine the journals of the houses to see if the section was duly passed; and further, that if duly passed the law of 1897 is in contravention of the constitution. On none of these propositions do I express an opinion, because it may be conceded that no law was passed on the subject in 1897, and still I do not think plaintiff is entitled to the writ. Section 2641 of the Political Code was amended March 9, 1893, and the amendment took effect immediately. The county government law

of 1893 was passed March 24, 1893, and took effect in January, 1895. That portion of the act of 1893 relating to this county declares that supervisors shall receive a salary of six hundred dollars a year and mileage in going to the place of meeting of the board, and makes no provision for any compensation for their services as *ex officio* road commissioners. By the act of 1893 the salary of supervisors, as such, is fixed at a certain sum and an additional amount allowed them as road commissioners in a number of counties, and these additional amounts are different from the compensation fixed in the section of the Political Code, and the reasonable construction of the act is that where the intention was to pay them anything for their services as *ex officio* road commissioners such intention found expression in the act itself. Indeed, section 216 provides that 'the salaries and fees provided for in this act shall be in full compensation for all services of every kind and description rendered by the officers therein named, either as officers or *ex officio* officers, their deputies and assistants, unless in this act otherwise provided.' And section 236 declares that 'all acts and parts of acts inconsistent with this act are hereby repealed.'

"The supervisors are *ex officio* road commissioners. This act of 1893 provides for the payment of the road commissioners in some counties of a *per diem*, in others of mileage, and in others, of which this county is one, simply for the salary of the supervisor, with the general provision that the salary provided for is to be in full for all services rendered by the officers named in the act either as officers or *ex officio* officers. The section of the Political Code provides for the payment of all road commissioners at the rate of twenty cents a mile. The laws are clearly inconsistent in this matter, and the act of 1893 being the latest will prevail. I do not say that the county government law of 1893 is now the law; but only that if the law of 1897 was not really passed by the legislature, then the law of 1893 will prevail over the section of the Political Code, because the latest expression of the legislative will."

It is now insisted that the County Government Act of 1893 is unconstitutional, and therefore the aforesaid section of the Political Code was not repealed by that act. We

find no constitutional objection to section 195 of the County Government Act of 1893. The objections made by appellant to subdivision 15 of section 191 of the act of 1897, even conceding them to be sound in law, cannot be taken to the act of 1893, as there are no such provisions in that act.

For the foregoing reasons the judgment is affirmed.

Van Dyke, J., and Harrison, J., concurred.

[S. F. No. 1004. Department Two.—June 23, 1899.]

J. E. CLUNE, Appellant, v. H. W. QUITZOW, Respondent.

TRIAL—FAILURE OF PLAINTIFF TO APPEAR—COUNTERCLAIM—DISMISSAL—JUDGMENT UPON MERITS.—Upon issue joined in an action to recover money, where the defendant has set up a counterclaim, plaintiff is not entitled to a dismissal of the action, under section 581 of the Code of Civil Procedure, without the consent of the defendant; and, upon failure of the plaintiff to appear at the trial, the defendant is not bound to take a dismissal of the action, though he might do so, but he has the right, under section 581 of that code, to proceed with the case, in the absence of the plaintiff, unless the court for good cause otherwise directs, and to have a judgment entered upon the merits finally disposing of the case; and it is not error for the court to grant such judgment.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco, James Troutt, Judge.

The facts are stated in the opinion.

Sullivan & Sullivan, and P. L. Koscialowski, for Appellant.

H. W. Quitzow, and Sawyer & Burnett, for Respondent.

HAYNES, C.—This action was based upon three separate causes of action to recover certain sums of money. The defendant answered, putting the facts in issue, and sought to recover from the plaintiff four hundred and four dollars and thirty-seven cents. Plaintiff failed to appear at the

trial. The defendant, as appears from the judgment, was sworn and examined as a witness, and the court thereupon entered judgment that plaintiff "do take nothing by his his said action as against H. W. Quitzow, defendant, but that judgment be, and the same is hereby, entered herein in favor of the defendant for his (defendant's) costs and disbursements incurred in this action, amounting to the sum of ten dollars."

The plaintiff appeals from the judgment, upon the judgment-roll, contending that: "Plaintiff having failed to appear at the trial, having offered no proofs, and having in effect abandoned the case, the judgment should have been a judgment of dismissal, and not on the merits."

Appellant relies upon sections 581 and 582 of the Code of Civil Procedure. Section 581 contains six subdivisions, setting out the circumstances under which an action may be dismissed, or a nonsuit entered. Under subdivision 3 the defendant might have had the action dismissed, but he was not bound to do so. The plaintiff could not have had the action dismissed, under this section, without the consent of the defendant, because affirmative relief was sought by the answer. Section 582 provides: "In every case, other than those mentioned in the last section, the judgment must be upon the merits."

Section 594 of the Code of Civil Procedure provides: "Either party may bring an issue to trial, or to a hearing, and in the absence of the adverse party, unless the court, for good cause, otherwise direct, may proceed with his case, and take a dismissal of the action, or a verdict, or judgment, as the case may require."

It was the right of the defendant, under the provisions of said section, to proceed with the case, and to have a judgment entered finally disposing of the case, and the court did not err in granting it.

I advise that the judgment be affirmed.

Chipman, C., and Cooper, C., concurred.

For the reasons given in the foregoing opinion the judgment is affirmed. McFarland, J., Temple, J., Henshaw, J.

[S. F. No. 1103. Department Two.—June 23, 1899.]

LUCINDA SWAIN, Appellant, v. DAVID JACKS, Respondent.

CONTRACT OF SALE—TITLE UNDER FORECLOSURE—PAYMENT BY MORTGAGOR—CONDITIONAL PROVISIONS—CONSTRUCTION.—A contract providing that a mortgagee, upon payment of two thousand dollars by one of two mortgagors would bid in the mortgaged premises under foreclosure, for the full amount of the mortgage debt of four thousand dollars, interest, costs and expenses, and, if there was no redemption, would, upon payment within six months of the residue of the bid, with interest, after deducting the payment made, assign the certificate of sale to such mortgagor, or would, within thirty days after obtaining a deed, convey the property to him, upon payment of the full amount of the original bid, with interest, taxes, et cetera, crediting thereon a first mortgage to be executed for four thousand dollars, upon terms and conditions specified, time being of the essence of the contract, and that, in case of redemption by a third party, the contract should end, and the two thousand dollars should be repaid—is not to be construed as an ordinary, simple contract for the sale of land, with a payment of two thousand dollars made thereon, as part of the purchase price.

ID.—CONSIDERATION FOR PAYMENT—CONDITION OF RECOVERY BACK.—The relieving of the mortgagor, under such contract, from any deficiency judgment, was a consideration for the payment of the two thousand dollars; and if the contract is not rescinded, the money paid cannot be recovered back upon any other condition than that of the redemption by a third party specified in the contract.

ID.—OFFER OF PERFORMANCE BY PURCHASER—ABSENCE OF VENDOR FROM STATE—EXCUSE.—Under a contract of sale, where there was no tender or offer of performance by the purchaser at any time; the fact that the vendor was absent from the state, when performance by the purchaser was required, can not excuse or render impossible an offer of performance, which might be made, in such case, under the terms of section 1489 of the Civil Code.

ID.—EFFORTS OF PURCHASER TO CORRESPOND—RESCISSION—RECOVERY OF PAYMENT.—Mere ineffectual efforts of the purchaser, by correspondence and inquiry, to communicate with the absent vendor, and to seek performance of the contract from the vendor, does not render the failure of the vendor to comply with the contract within the time limited an election to rescind the agreement on his part, or authorize the recovery back of the money paid under the terms of the contract by the purchaser.

APPEAL from a judgment of the Superior Court of Santa Clara County. John Reynolds, Judge.

The facts are stated in the opinion of the court.

H. V. Morehouse, and F. J. Hambly, for Appellants.

Time being of the essence of the contract, and both parties having failed to perform, the money paid may be recovered. (*Drew v. Pedlar*, 87 Cal. 443; 22 Am. St. Rep. 257; *Cleary v. Folger*, 84 Cal. 316; 18 Am. St. Rep. 187; *White v. Buell*, 90 Cal. 177.) It appearing that a tender and demand of a deed would be of no avail, it was excused. (*Merrill v. Merrill*, 95 Cal. 334; *Dowd v. Clarke*, 54 Cal. 48; *Wood v. McDonald*, 66 Cal. 547.)

Francis E. Spencer, for Respondent.

The facts do not excuse the absence of a formal offer to perform, which might have been made under very condition alleged to have existed, and the pleading is insufficient to show an excuse. (Civ. Code. sec. 1489, subd. 3; *Samuel v. Allen*, 98 Cal. 406; *Smith v. Smith*, 25 Wend. 405.) The complaint must set out the facts showing a tender or valid offer to perform. (*Duff v. Fisher*, 15 Cal. 381; *Heine v. Treadwell*, 72 Cal. 221; *Townsend v. Tufts*, 95 Cal. 261; 29 Am. St. Rep. 107.)

McFARLAND, J.—A demurrer to the amended complaint was sustained in the court below, and judgment went for defendant. Plaintiff appeals.

The action is to recover two thousand dollars alleged to have been received by defendant for the use of plaintiff. The alleged cause of action is founded upon a written contract, set out in full in the complaint, between defendant and one Devendorf (plaintiff's assignor), executed February 14, 1892. The contract is, in substance, as follows: It recites that Jacks had brought an action for the foreclosure of a mortgage executed to him by Devendorf and one Capp, dated June 22, 1887, for four thousand dollars, with interest at eight per cent per annum, compounded semi-annually, and that Jacks proposed to proceed to judgment and have the mortgaged premises sold. Then Devendorf agrees to pay Jacks two thousand dollars upon the latter's agreement to bid in the

premises at the foreclosure sale for the amount of the judgment; and Jacks agrees that upon the payment to him of the two thousand dollars he will bid in the premises "for the full amount of his judgment, claim, interest, costs, and expenses of said action." Jacks further agrees that in the event that no redemptioner shall redeem from the sale within six months, if Devendorf, within the redemption period, shall pay him the full amount which he had bid, less the said sum of two thousand dollars, with interest on the balance, et cetera, he will assign to Devendorf the certificate of purchase. Jacks further agrees that in case no redemption is made, and Devendorf also fails to pay said balance within the six months, Jacks will, at any time within thirty days after he shall receive a sheriff's deed, upon payment to him by Devendorf of the full amount of the original bid, with interest, taxes, et cetera, execute and deliver to Devendorf, or anyone he may appoint, a deed conveying all the interest and estate the premises acquired by him by the sheriff's deed; Devendorf, however, to pay all taxes, costs, expenses, et cetera, which Jacks may have incurred, with interest on the same at eight and one-half per cent per annum, and all costs and expenses for drawing and recording papers, et cetera; and Jacks also agrees that he will receive in part payment of the purchase money the promissory note of the purchaser for the sum of not exceeding four thousand dollars, payable two years after date, with interest, and with other conditions not necessary to be named — the promissory note to be secured by a first mortgage on the premises. It is then provided as follows: "Time is of the essence of this contract; and after the expiration of thirty days from the date of said sheriff's deed all of the rights of said Devendorf accruing by virtue of this agreement shall absolutely cease and determine." It is also further provided that "in case a redemption shall be made from said Jacks by any party entitled thereto, within the time allowed by law, and for the full amount bid by said Jacks at said sheriff's sale, with two per cent per annum thereon, up to the time of redemption, then and in that case said Jacks shall repay the said Devendorf the sum of two thousand dollars. It is further provided that if said real estate shall be bid in by any other person at said sheriff's sale for the full

amount of said Jack's judgment, interest, costs, and expenses, then this agreement to be void and of no further effect."

It is averred in the complaint that thereafter, on or about April 22, 1892, Devendorf assigned all his rights and equities under the contract to the plaintiff herein; and that Jacks recognized the plaintiff as such assignee, and placed her in possession of the premises as a person entitled to all the rights of Devendorf under the contract. It is further averred that thereafter the sheriff's sale took place, and Jacks bid in the land for the full amount of his claim, and that the plaintiff paid two thousand dollars to him on or about the said twenty-second day of April, 1892; and that no one having redeemed within the statutory period, the sheriff executed the deed of the premises to Jacks. It is then averred that within thirty days after the execution of the sheriff's deed plaintiff "was ready, willing, and able to comply in all respects with the above quoted terms, conditions, and provisions of said contract, and repay the moneys therein required to be paid, and to receive said conveyance of said premises from said Jacks, and to make and execute and deliver to him the note and mortgage provided to be given by her, but the said plaintiff, Lucinda J. Swain, avers that the said Jacks, on his part, utterly failed and neglected to perform or offered to perform his part of said contract, or make, or execute, or deliver, or offer to deliver said deed; but, on the contrary, by his acts and negligence made impossible the performance of said contract by said plaintiff." The said "acts and negligence" are then averred to be these: That during said period of thirty days and for some weeks prior thereto, and for several months thereafter, the said Jacks was absent from the state of California in some portion of the eastern states unknown to said plaintiff, and that during his said absence the said Jacks left and had no agent or attorney-in-fact within the state of California empowered to execute any of the terms of said contract, or to make or deliver said deed, or receive said money or said note and mortgage of said plaintiff"; and that during said thirty days she "made every reasonable and proper effort by correspondence and by inquiry to find and communicate with said Jacks, and to procure the completion of the terms of said contract and the title in her to the said property, and she was totally unable so to do." It is then averred

that, "by reason of the facts aforesaid," plaintiff was prevented from performing her part of the contract, and defendant failed to perform or offered to perform his part thereof, and thereby "elected to rescind" said agreement, and that the same was thereby rescinded, and that "the failure of both plaintiff and defendant to comply with the terms thereof within thirty days, as therein provided," terminated the contract, and that the same has thereby become at an end. It is then averred: "That by reason of the facts aforesaid plaintiff alleges that said defendant received from said plaintiff the sum of two thousand dollars to the use of said plaintiff."

The demurrer was properly sustained. It will be observed that there is in the contract an express provision that Jacks shall repay the two thousand dollars, and the contract shall end, in the event of a redemption by a third party; and that there is no other provision whatever for the repayment of the money. There was evidently a consideration for the payment of the two thousand dollars by Devendorf in the fact that Jacks was to bid the whole amount of his claim and thereby relieve the former from any deficiency judgment; and, as a corollary to this, it was agreed that if some third person should redeem by paying the full amount of Jack's bid, with interest, percentage, et cetera, so that Jack's entire claim should be satisfied without the aid of the two thousand dollars paid by Devendorf, then the last-named sum of money should be repaid to Devendorf. But this event, upon the happening of which the money was to be repaid, never occurred. Therefore, appellant is not justified in taking the position that the contract should be treated as an ordinary, simple contract to sell land where there has been part payment of the purchase price. But if this view could be taken of it, still the complaint is insufficient, because no tender of performance of her part of the contract was made within the thirty days, or at any time. (See *Townsend v. Tufts*, 95 Cal. 257, 29 Am. St. Rep. 107, which, on this point, is nearly identical with the case at bar; also *Scott v. Glenn*, 98 Cal. 168, and cases there cited.) No sufficient excuse is alleged for not making the tender; section 1489 of the Civil Code prescribes how a tender shall be made under the circumstances set forth in the complaint. (*Samuel v. Allen*, 98 Cal. 406.)

The facts averred do not constitute a rescission of the contract by respondent. (*Haile v. Smith*, 113 Cal. 661, and cases there cited; *Glock v. Howard, etc. Co.*, 123 Cal. 1; 69 Am. St. Rep. 17.)

The judgment appealed from is affirmed.

Temple, J., and Henshaw, J., concurred.

[S. F. No. 1005. Department Two.—June 23, 1899.]

MARGARET E. BANE, Administratrix, etc., Respondent,
v. M. H. PEERMAN, Appellant.

CLAIM AND DELIVERY—INSUFFICIENT COMPLAINT—PAST OWNERSHIP.—

A complaint in an action of claim and delivery, which merely avers the past ownership by the plaintiff of the personal property claimed on the day of the seizure thereof by the defendant, and a demand of possession on that day, and does not aver any continued or present ownership or right of possession on the part of the plaintiff, is not aided by an averment that defendant "still unlawfully withholds and detains said goods and chattels," and is insufficient to sustain a cause of action, or to support a judgment for the plaintiff.

ID.—OWNERSHIP AT COMMENCEMENT OF ACTION—FINDINGS OUTSIDE OF ISSUES.—Such complaint cannot be supported or cured by findings outside of the issues, setting forth the ownership and right of possession of the plaintiff at the commencement of the action. Findings of fact must have a basis in the pleadings and be within the issues, and can never cure the absence of an essential allegation.

APPEAL from a judgment of the Superior Court of Sonoma County. S. K. Dougherty, Judge.

The facts are stated in the opinion.

A. B. Ware, and Thomas Rutledge, for Appellant.

R. M. Swain, and Barham & Miller, for Respondent.

HAYNES, C.—Since this appeal was taken respondent, D. C. Bane, died, and Margaret E. Bane, administratrix of his estate, has been substituted by this court as plaintiff and respondent.

This action is in claim and delivery. Findings and judgment were in favor of the plaintiff, and the defendant appeals from the judgment on the judgment-roll.

It is contended by appellant that the complaint does not state facts sufficient to constitute a cause of action, and that the findings are defective and do not support the judgment.

The complaint alleges: "That on the ninth day of July, 1896, said plaintiff was the owner and entitled to the immediate possession of all the following goods and chattels:that the said defendant on the ninth day of July, 1896, at Santa Rosa, Sonoma county, without plaintiff's consent, and wrongfully, took said goods and chattels from the possession of plaintiff, and has continuously retained the same." A demand is alleged to have been made "on the ninth day of July, 1896," for possession of said goods, and that defendant "still unlawfully withholds and detains said goods and chattels," et cetera. The complaint was sworn to and filed on July 23, 1896.

The defects in the complaint in this case cannot be distinguished from those considered in *Truman v. Young*, 121 Cal. 490, and upon the authority of that case, and others there cited, we conclude that it does not state a cause of action.

Respondant contends, however, that the defective allegations in the complaint are cured by the findings. But here there is a total failure to allege that the plaintiff was the owner of the property and entitled to its possession at the time the action was commenced, and not a defective allegation that he was the owner and entitled to the possession at that time. Sufficient findings to support a judgment must have a basis in the pleadings, and never cure the absence of an essential allegation. Findings of fact must be within the issues, and there was no issue to the ownership and right of possession when the action was commenced. The issue as to the ownership and right of possession on the ninth of July was immaterial.

I advise that the judgment appealed from be reversed, with leave to the plaintiff to amend the complaint.

Chipman, C., and Cooper, C., concurred.

For the reasons given in the foregoing opinion the judgment appealed from is reversed, with leave to the plaintiff to amend the complaint.

McFarland, J., Temple, J., Henshaw, J.

[S. F. No. 1055. Department Two.—June 23, 1899.]

HERMAN MESENBURG, Respondent, v. JAMES DUNN,
Appellant.

ACTION TO ANNUL CONTRACTS OF SALE—FRAUD—RECOVERY OF PURCHASE MONEY—EQUITY JURISDICTION—JURY TRIAL.—In an action by a purchaser under contracts for the sale of lands, to have them annulled on the ground of false representations inducing the purchase, and to recover back the purchase money paid, the court, as a court of equity, has jurisdiction of the main action, and a general jury trial of all the issues cannot be demanded in the action. Where no issue is raised as to the amount of money paid under the contract, and the answer merely denies the false representations, there is no issue upon which a jury trial can be demanded, and the court, upon determining the issues in favor of the plaintiff, may award full relief, to prevent further litigation.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. J. C. B. Hebbard, Judge.

The facts are stated in the opinion of the court.

Daniel Titus, for Appellant.

The action is one at law to recover money paid; but if it combines both equitable and legal remedies, the defendant is entitled to a jury trial of the facts upon which the legal remedy depends. (*Hughes v. Dunlap*, 91 Cal. 385; *Newman v. Duane*, 89 Cal. 598; *Haines' Appeal*, 73 Pa. St. 172; *Norris' Appeal*, 64 Pa. St. 281; *Tillmass v. Marsh*, 67 Pa. St. 508; *Coal Co. v. Snowden*, 42 Pa. St. 488; 82 Am. Dec. 530; *Pomeroy's Equity Jurisprudence*, sec. 116.)

Otto Tum Suden, for Respondent.

The jurisdiction was in equity (*Loaiza v. Superior Court*, 85 Cal. 11; 20 Am. St. Rep. 197), which could afford complete relief, to prevent future litigation (*Watson v. Sutro*, 86 Cal. 529); and the parties were not entitled to a jury trial of the issues joined. (*Fish v. Benson*, 71 Cal. 435; *Wheelock v. Godfrey*, 100 Cal. 585; *Churchill v. Baumann*, 104 Cal. 372; *Crocker v. Carpenter*, 98 Cal. 418.)

McFARLAND, J.—This is an appeal by defendant from a judgment in favor of the plaintiff; and the only point made for a reversal is that the court erroneously denied appellant's demand for a jury trial.

It is averred in the complaint that plaintiff was induced by false representations, which are set forth, to enter into certain written contracts with defendant by which he agreed to purchase certain lands from the defendant, and that he paid to defendant as a part of the purchase price the sum of seven hundred and sixty dollars; and he prays for a decree of the court declaring said contracts null and void; and also that he have judgment for said seven hundred and sixty dollars. The demand for a jury was general and embraced the whole case, the language being, "demands a jury and that said cause be tried by a jury." The main purpose of the action to wit, to have the contracts declared null and void, clearly brought that part of the action within equitable jurisdiction; and under no view was the defendant entitled to have the whole case tried by a jury. But, waiving that point, his demand for a jury was, upon general principles, properly denied. The recovery of the part payment made under the contract was merely incidental to the main issue, and the court, as a court of equity having jurisdiction of the main action, properly determined the whole controversy so as to prevent futile litigation, no issue being raised except as to the matters upon which plaintiff founded his demand for the equitable interposition of the court. In his answer the appellant merely denied the alleged facts as to the false representation, and no issue is raised as to the amount of money paid on the contract; and, therefore, it is not a case where a legal defense strictly cognizable in a court of law is made to a complaint which is in form a bill of equity, and is unlike *Donahue v. Meister*, 88 Cal. 121; 22 Am. St. Rep. 283; *Newman v. Duane*, 89 Cal. 597, and other cases cited by appellant. The case at bar is within the principles declared in *Crocker v. Carpenter*, 98 Cal. 418, where some of the cases cited by appellant are reviewed and distinguished from cases like the present one.

The judgment appealed from is affirmed.

Temple, J., and Henshaw, J., concurred.

[S. F. No. 1045. Department One.—June 24, 1899.]

**WILLIAM KNOWLES, Respondent, v. E. J. BALDWIN,
Appellant.**

MECHANICS' LIENS—DEFERRED PAYMENT TO CONTRACTOR—PROVISO AGAINST LIENS—FILING OF CONTRACTOR'S LIEN.—A provision in a building contract which is framed in compliance with section 1184 of the Code of Civil Procedure, that the last payment or twenty-five per cent of the contract price should become due thirty-five days after the completion and acceptance of the building. "provided said building and premises were free and clear from all liens and incumbrances arising from or created or placed thereon by said contractor," does not preclude the filing of a lien by the contractor before the expiration of the thirty-five days, under section 1187 of that Code.

ID.—GIVING OF CREDIT—EFFECT UPON LIEN.—The giving of credit for a longer period does not affect the time within which the notice of lien must be filed; but under section 1190 of the Code of Civil Procedure, if credit is given by the terms of the contract, suit may be brought upon the lien within ninety days after the expiration of the credit.

ID.—GENERAL DEMURRER—RIGHT TO RELIEF.—Where the complaint for the foreclosure of the lien of the contractor was demurred to generally, the demurrer should be overruled if the complaint entitles the plaintiff to any relief.

ID.—ALLOWANCE OF INTEREST.—The contractor, in an action to enforce his lien, is entitled to interest on the respective payments to be made under the contract, from the dates when they became due; and a decree directing interest only as of the date of the commencement of the trial is to the prejudice of the plaintiff, and not of the defendant.

ID.—DATE OF TRIAL—FINDINGS OF FACT—RECORD UPON APPEAL—MINUTE ORDERS—JUDGMENT ROLL.—The recital as to the date of the commencement of the trial in the findings of fact must prevail as against entries of minute orders appearing in the transcript under the certificate of the clerk, which are not part of the judgment roll, and which cannot be considered as part of the record upon appeal from the judgment or noticed for the purpose of contradicting the findings of fact.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. Edward E. Belcher, Judge.

The facts are stated in the opinion.

Henry I. Kowalsky, and George Hayford, for Appellant.

William H. Jordan, for Respondent.

COOPER, C.—Action to recover for balance due on contract for repairs, labor, et cetera, and to have the same declared a lien on premises described in complaint. Judgment for plaintiff. Defendant appeals from the judgment on the judgment-roll alone. The principal point on which defendant relies is the order of the court below overruling defendant's demurrer to the complaint. The complaint was in two counts, and alleged in substance: That on the twenty-fifth day of August, 1896, the plaintiff entered into a written contract with defendant by the terms of which plaintiff was to make certain improvements and changes in the building known as the Baldwin Hotel, situate in the city and county of San Francisco, upon the premises described in the complaint, for the sum of three thousand dollars, to be paid as follows: Seven hundred and fifty dollars when the basement should be ready for plastering, seven hundred and fifty dollars when the plastering should be completed, seven hundred and fifty dollars when all should be completed and accepted, and the final payment, "seven hundred and fifty dollars, thirty-five days after completion and date of acceptance, provided said building and premises were free and clear from any and all liens and incumbrances arising from or created or placed thereon by the said contractor or any person claiming to have furnished him labor or materials for the erection and completion of said work." That the work was fully completed, according to the contract, on December 8, 1896, and that fifteen hundred dollars had been paid, and no more. That on the fourth day of January, 1897, plaintiff duly filed his notice of lien with the county recorder, which notice stated the statutory requirements. That the premises described in the complaint were necessary for the convenient use and occupation of the building thereon. The second count alleged that the plaintiff did certain extra work at the request of defendant of the reasonable value of two hundred and seventy-five dollars, no part of which had been paid, and contained like allegations as to description, filing of lien, et cetera. The complaint and each count thereof was demurred to upon the ground that it did not state facts sufficient to constitute a cause of action.

The defendant contends that the complaint does not state facts sufficient for the reason that the contract upon which the lien is sought to be foreclosed provides that no lien shall be filed for thirty-five days after the completion of the contract. Such construction is sought to be placed upon the clause quoted from the complaint. The complaint was filed February 12, 1897, and there is no question but that the full amount of the contract price, according to the complaint, was overdue at the time of the commencement of the action. The only question is as to the last seven hundred and fifty dollars which was to become due thirty-five days after the completion and date of acceptance of the contract, "provided said building and premises were free and clear from any and all liens and encumbrances arising from or created or placed thereon by said contractor." It is claimed that the clause last quoted is equivalent to an express agreement that no lien shall be filed by the contractor till after the expiration of the thirty-five days. We do not think so. The code (Code Civ. Proc., sec. 1184), provides that by the terms of the contract at least twenty-five per cent of the contract price shall be made payable at least thirty-five days after the final completion of the contract. In this case there is no question but that the contract complied with the said section. Section 1187 provides that the contractor, at any time after the completion of his contract and until the expiration of sixty days, may file his notice of lien. Reading the two sections together, it is plain that by the terms of the contract at least twenty-five per cent of the contract price must not become due until thirty-five days after its completion, and that at any time after the completion and before the expiration of the sixty days the notice of lien may be filed. In fact, the giving of credit for a longer period would not affect the time within which the notice of lien must be filed. This is shown by section 1190, which provides that suit must be brought to enforce a lien within ninety days after filing the lien, unless by the terms of the contract credit was given, and in such case within ninety days after the expiration of the credit.

Moreover, the demurrer was general, and in such case it should be overruled if the complaint entitles the plaintiff to any relief. (*Fleming v. Albeck*, 67 Cal. 227.)

The defendant's argument as to the demurrer in this case does not apply to any portion of the complaint except the last payment of seven hundred and fifty dollars in the first count. If we should hold that a special demurrer would lie to that portion of the first count which set up the time when the last seven hundred and fifty dollar payment would be due, we would still have a good complaint as to the third payment of seven hundred and fifty dollars, and as to the two hundred and seventy-five dollars for extras. It is claimed that the judgment directed interest from March 23d instead of April 30th, the date of filing the findings. The plaintiff was entitled to interest at the legal rate upon the respective payments from the dates they become due. The findings directed interest from February 12, 1897, which was less than the interest to which plaintiff was entitled. The decree which was entered directed interest from March 23, 1897, which was less than directed by the findings. The findings and decree recite that the action came on for trial March 23, 1897, and we must presume they speak the truth. We cannot notice the entries in the transcript purporting to be minute orders. They are inserted after the certificate of the clerk to the judgment-roll and are not certified as being a part of it, and if so certified they would not be a part of it. (Code Civ. Proc., sec. 670.)

It appears to us that this appeal is entirely devoid of merit, and we advise that the judgment be affirmed.

Gray, C., and Chipman, C., concurred.

For the reasons given in the foregoing opinion the judgment is affirmed. Garoutte, J., Van Dyke, J., Harrison, J.

[S. F. No. 1197. Department Two.—June 24, 1899.]

QUEEN MONTGOMERY et al., Respondents, v. J. J. RAUER, Appellant.

GUARDIAN AND WARD—DEPOSIT OF WARD'S FUNDS—TRUST—SET-OFF—
DEBT OF GUARDIAN.—One who has received on deposit moneys be-
longing to minors from their guardian, with whom he has rela-

tions of personal trust and confidence, and with knowledge of their origin and character as the trust funds of the minors, is the trustee of the minors in relation thereto, and cannot offset or charge against them any individual indebtedness of the guardian to him.

ID.—RECEIPT AND RELEASE BY GUARDIAN—ESTOPPEL—PLEADING—RIGHT OF WARDS TO ATTACK SETTLEMENT.—Where the guardian gave to the depositary a receipt in full of the moneys of the wards, and a release of all demands, the depositary cannot rely upon them as an estoppel against the wards, in an action by them to recover the moneys on deposit, without pleading the estoppel, and where it appears that the settlement was not fair, and the signature of the guardian was obtained through mistake, misrepresentation and fraud, and that fifteen hundred dollars of the moneys of the minors still remained in the hands of the depositary, it is the right of the wards to go behind the settlement and show the facts.

ID.—ELECTION OF WARDS—STATUTE REQUIRING CONSENT OF COURT.—Such release and receipt having been improperly obtained by the depositary from the guardian, the wards have an election either to pursue the guardian and his sureties, or the person with whom the settlement was made; and this is their right, independent of any statute requiring a guardian to obtain the consent of the court to such a settlement.

ID.—BURDEN OF PROOF.—Where the wards took upon themselves the burden of proving the unfairness and fraudulent character of the settlement induced by the depositary, and successfully carried it, it is immaterial whether the burden of proof is properly upon them to impeach the settlement, or whether the duty of showing the fairness of the settlement is upon the depositary.

ID.—PLEADING—AVOIDANCE OF RELEASE FOR FRAUD—ANTICIPATION OF DEFENSE—REBUTTAL.—The wards in an action against the depositary were not bound to anticipate the defense of a release and discharge by the guardian, or to plead an avoidance of it in their complaint on the ground of fraud. If the release and discharge had been pleaded in bar of the action, the plaintiff could have avoided it in rebuttal by proof of fraud, without special averment, and may rebut it by like proof, when offered in evidence by the defendant, without being pleaded.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. William R. Daingerfield, Judge.

The facts are stated in the opinion of the court.

G. H. Perry, and Fisher Ames, for Appellant.

Marcus Rosenthal, for Respondent.

HENSHAW, J.—Plaintiffs, who are minors, sued defendant by an action in form for moneys had and received. Defendant answered, alleging that “the above-named minors have received all of the moneys deposited by their said guardian, Agnes S. Montgomery, with this defendant.” He followed this averment by a denial that the sum of four thousand dollars demanded in the complaint, or any other sum of money, was due, owing, and unpaid from him to the plaintiffs. The action was tried before a jury, which returned a verdict against him in the sum of fifteen hundred dollars. From the judgment and from the order denying him a new trial, he appeals.

The following are the salient facts: Mrs. Montgomery was a widow and the mother of the plaintiffs. Defendant Rauer possessed her confidence, and managed many of her business and legal affairs. She was guardian of the estates of her children. She put into Rauer’s hands two thousand dollars of her own money and five thousand dollars of the money of the children. Rauer received these funds with full knowledge of their origin, character and ownership. He knew that the five thousand dollars were the trust funds of the minors, and so received it. Other moneys of Mrs. Montgomery passed into his hands. Over these there is a conflict in the evidence; over the others, none. Defendant contends that he paid back to Mrs. Montgomery more money than he received; also, that in adjusting the accounts and finding the balance, allowance of many sums which should have been credited him was improperly withheld on the ground that they could not be charged against the minors’ moneys. He insists that he was justified in offsetting against all the moneys which he had received from Mrs. Montgomery all the payments which he had made to her, and all items chargeable against her, and that he was not accountable to the minors for their separate funds as such.

But Rauer received the children’s moneys from their guardian, knowing their character. Knowing them to be trust funds, and having received them as such, he could not charge them with the individual debts of the guardian. (*Wallace v. Brown*, 41 Ind. 436; *Baughn v. Shackelford*, 48 Miss. 225; *Austin v. Willson*, 21 Ind. 252.)

Yet this in many instances is precisely what he attempted

to do. Moreover, there being evidence to establish the fact that a voluntary relation of personal confidence and trust existed between Mrs. Montgomery and Rauer, Rauer became a trustee for the minors under section 2290 of the Civil Code, which declares that: "Everyone who voluntarily assumes a relation of personal confidence with another is deemed a trustee within the meaning of this chapter, not only as to the person who reposes such confidence, but also as to all persons of whose affairs he thus acquired information which was given to such person in the like confidence, or over whose affairs by such confidence he obtained any control." Therefore, if Mrs. Montgomery personally became indebted to him, it was not permissible to charge such debts against the minors' funds. If he repaid the minors' money or any part of it to the guardian, he is, of course, not concerned with the future disposition which she might make of it, nor is he accountable therefor; but he cannot set off against these trust moneys Mrs. Montgomery's individual liability to himself. The court upon this matter correctly instructed the jury. But whether the amount due be estimated upon this basis, or whether it be computed by subtracting from all the moneys in Rauer's hands all payments made by him to Mrs. Montgomery, and all items chargeable against her individually, in either case the evidence supports the verdict.

But for a further defense appellant relies upon two written instruments signed by Mrs. Montgomery before the commencement of this action. One is in form a receipt for the repayment of the sum of five thousand dollars, and is signed by Mrs. Montgomery as guardian of the minors. The other is a longer document and recites that whereas Mrs. Montgomery individually, and as guardian of her children, and J. J. Rauer have settled all of their accounts, "upon which settlement it is mutually agreed and understood that the sum of one hundred dollars is at this present date due and owing from said J. J. Rauer to said Agnes S. Montgomery in her capacity as above stated," therefore, in consideration of the receipt of the sum of one hundred dollars, Agnes Montgomery releases and discharges Rauer from all claims, demands, and charges from the beginning of the world until the present date. It is contended by appellant that this release is absolutely binding upon the parties except it be avoided upon

some ground of equitable cognizance; that this action is not an action to annul the instrument upon the ground of fraud or mistake, and that therefore the judgment is erroneous. But it is to be noted that the defense does not set up an accord and satisfaction, nor tender an issue upon the release in any way. It rests simply upon a denial that any sum is due from the defendants to the plaintiffs, coupled with an averment that all of the minors' moneys which had come into defendant's hands had been repaid by him. This is an action by the minors to recover their money. Mrs. Montgomery's individual demands against Rauer are in no wise involved. If Rauer relied upon the release as an estoppel he should have pleaded it; but in such a case as this it is only when the settlement has been fair and free from fraud and mistake, and one by which the rights of the minors have been fully protected, that it can operate to bind them. Mrs. Montgomery admitted that she signed these documents, but contended, and supported her contention by evidence, that her signatures were procured through mistake, misrepresentation, and fraud. This was accompanied by evidence to the satisfaction of the jury that the settlement was not fair, because, as they found, there were fifteen hundred dollars of the minors' money still in Rauer's possession. It was, therefore, permissible for the minors to go behind this settlement and show the facts. So showing, they have their election to pursue either the guardian, his sureties, or the person with whom the settlement was made. This is their right, independent of any statute requiring a guardian to obtain the consent of the court to such a settlement. (*Hayes v. Massachusetts Mut. L. Ins. Co.*, 125 Ill. 626; *Culp v. Lee*, 109 N. C. 675; *Hagy v. Avery*, 69 Iowa, 434; *Lunday v. Thomas*, 26 Ga. 537.) And it matters not whether the burden of proof to impeach the settlement is upon the ward, as seems to have been held in *Torry v. Black*, 58 N. Y. 185, or whether the duty of showing its fairness is upon the debtor, as laid down in *Hagy v. Avery*, *supra*; for in this case the wards took upon themselves that burden, and successfully carried it. Nor may the further objection of appellant be sustained that the plaintiffs, not having pleaded an avoidance of the release, should not have been permitted to prove it. They were not compelled to anticipate defenses. If the release and discharge

had been set out in bar of the action, still, under our system of pleading, which permits no replication, the defense of fraud would have been open to the plaintiffs without special averment. Equally is it open to them to rebut the effect of the release by the same evidence when, though not pleaded by defendant, it is offered and admitted in evidence.

The case was tried upon the principles announced, and we perceive no just ground for criticism of the court's instructions.

The judgment and order appealed from are therefore affirmed.

Temple, J., and McFarland, J., concurred.

[S. F. No. 791. Department Two.—June 24, 1899.]

ESTRELLA VINEYARD COMPANY, Respondent, v. A. B. BUTLER and WILLIAM FORSYTH, Partners under the Style of RAISIN GROWERS' PACKING ASSOCIATION, Appellants.

ASSUMPSIT—SALE OF RAISINS UPON COMMISSION—PLEADING—ELECTION OF COUNTS.—In an action to recover the value of raisins delivered to the defendants as commission agents, in which the first count of the complaint alleges delivery of the raisins to the defendants under an express agreement to make returns at a fixed price, the second count is in *quantum valebat*, and the third count alleges an agreement to sell and deliver the raisins for a fixed price, the plaintiff cannot be compelled to elect between the counts.

ID.—AGREEMENT FOR FIXED RETURN—CONFLICTING EVIDENCE—SUPPORT OF VERDICT.—It is sufficient to support a verdict in favor of the plaintiff, as to the agreement alleged in the complaint, that plaintiff was to receive a fixed return for the raisins delivered, that the testimony for the plaintiff tends to sustain the allegation, notwithstanding conflicting evidence to the contrary.

ID.—EVIDENCE—WRITTEN CONTRACT BY AGENT IN HIS OWN NAME—PROOF OF AUTHORITY OR KNOWLEDGE REQUIRED.—A written contract with the defendants for the delivery of raisins, signed by one who was an agent for the plaintiff, in his own name, without any designation of agency, in the contract or in the signature, the authority for the execution of which was not proved, but disproved, is not admissible in evidence against the plaintiff, without such proof or without showing or offering to show that the plaintiff

delivered the raisins thereunder with actual or implied knowledge of its existence. It is not enough to show that defendants on their part received the raisins under such contract.

ID.—QUALITY OF RAISINS—MARKET VALUE.—Where the contract proved by the plaintiff called for the delivery of raisins of good quality in a particular market, without specifying the place where they were to be sold, evidence is admissible to show the quality of the raisins delivered, and their market value in that market.

INSTRUCTIONS—REFUSAL OF REQUESTS.—The court may properly refuse requested instructions which invade the province of the jury, or may mislead them, or which are covered by instructions given in the charge of the court.

APPEAL from a judgment of the Superior Court of Fresno County and from an order denying a new trial. J. R. Webb, Judge.

The facts are stated in the opinion.

L. L. Cory, for Appellants.

George E. Church, and H. H. Welsh, for Respondent.

CHIPMAN, C.—Action to recover the value of 255,000 pounds of raisins, alleged to be worth \$7,650, on account of which plaintiff had received only \$4,090.82, leaving due the sum of \$3,559.18. The cause was tried by the court with a jury, and plaintiff had a verdict for \$2,840, upon which judgment was entered. The appeal is from the judgment and from an order denying motion for a new trial, and comes here on a statement of the case. The complaint sets forth three separate causes of action:

1. That between September 1, 1894, and January 1, 1895, at Fresno, California, plaintiff delivered to defendants the raisins in question, to be sold by defendants, as commission agents of plaintiff; and that defendants agreed, in consideration of said delivery, and prior thereto, that plaintiff would receive from defendants for the sale of said raisins a price not less than three cents per pound, and that defendants would account to plaintiff and pay plaintiff as the proceeds of said raisins a price not less than three cents per pound;
2. Alleges the delivery of the raisins at the request of defendants; that they afterward sold the same, and that the reasonable value thereof was \$7,650, no part of which has been

paid except \$4,090.82; 3. Alleges the delivery of the raisins to defendant upon an agreement that they would pay plaintiff three cents per pound therefor.

Defendants answered, specifically denying most of the material allegations of the complaint, but admitted the delivery of the raisins and alleged that they were so delivered "to be handled, marketed, and sold by said defendants upon commission, and as the agents and representatives of plaintiff, upon commission"; in an amended answer defendants set up a contract in writing, dated May 11, 1894, between one G. W. Taft and defendants, under which it is alleged that the raisins were delivered to defendants, and not otherwise. This contract provided, in brief, that defendants were to receive the raisins in the sweatbox, and pack and otherwise prepare them for market and sell them upon a commission of five per cent of the proceeds of this sale.

1. Defendants allege error in refusing their motion to compel plaintiff to elect. In the first count or cause of action plaintiff alleges delivery to defendants as commission agents under a specific agreement by defendants to make returns of proceeds at a given price; the second count is laid on *quantum valebat*; the third count alleges an agreement to sell and deliver for a given price. Plaintiff upon such complaint was not obliged to elect. (Code Civ. Proc., sec. 427; *Cowan v. Abbott*, 92 Cal. 100.)

2. It is claimed that "the evidence is insufficient to sustain the allegation that defendants agreed that plaintiff would receive from defendants three cents a pound for each pound of raisins delivered."

It appears from the testimony of Taft that he was the agent of plaintiff and disposed of the raisins for plaintiff. He testified that he spoke to William Forsyth, one of defendants, in May, 1894, about raising some money on plaintiff's crop, and was told that defendants would supply what money they wanted if defendants were allowed to handle the crop; witness replied: "I will give you a show at it if you will do as well by me as anybody. He says, 'All right; we will give you the \$2,000 and take a crop mortgage on the crop'"; the crop mortgage was drawn and is dated May 14th, and witness sent

it to plaintiff company for execution, and it was executed and delivered and was recorded May 24th. He testified: "He [Forsyth] handed me some contracts for me to send to the company to be signed by the president and secretary. I sent them down to be signed, and they were signed and sent back to me. It was probably a week before they came back to me. After they came back from Bakersfield I kept them." This is a contract similar in form to that under which defendants claim they received and handled the raisins; it was executed by plaintiffs, but the evidence is that it was never delivered to defendants. This phase of the case will be noticed later on. Taft testified that after getting the money on the crop mortgage he did not see Mr. Forsyth until August. As to what then took place he testified: "I saw Mr. Forsyth, and we got to talking about the crop. He wanted to know how much there was going to be; wanted to know if he was going to handle it. I told him that he would handle it if he would get me just as much as I could get anywhere else, or a little better, and he promised me that he would do as well by me as anybody else, and a little better. . . . He said he wanted the crop, knew it would be good, knew I understood curing, that it is a good large crop, and that he wanted it and would give me three cents, or see that I got three cents a pound and probably better. He said he had got to have the crop; had sold five hundred cars, and was depending on these large crops. I says, 'All right, Colonel; three cents is what I want, and that is what I am figuring on.' . . . He says, 'All right, Taft, you go ahead.' I informed the company of the matter by letter. I subsequently saw the secretary of the company, probably a week or ten days after, and before the raisins were delivered." The deliveries began September 22d, and continued to October 1st, amounting to 255,000 pounds. The testimony of this witness was that the agreement was to take all the crop of good raisins, and that all that were delivered were of No. 1 quality; there was other evidence that the market price for similar raisins at Fresno ranged from two and one-half to three cents per pound. It was admitted that defendants had disposed of all the raisins, and the undenied allegation of the verified complaint is, that they had made returns of only \$4,090.92. Defendant Forsyth testified that he made no such agreement as

was testified to by the witness Taft. It is not within the province of the court to say which one of these witnesses the jury should have believed. The evidence of plaintiff tends to sustain the allegations complained of.

3. Defendants offered in evidence the contract set forth in the answer, but the court excluded it, and defendants excepted and claim that the ruling was error. As this evidence tended to show an entirely different agreement from any claimed to have been made by plaintiff, it becomes important to determine whether the court erred in refusing the evidence.

Defendant Forsyth testified as to the advance of \$2,000, secured by mortgage, and, continuing, said: "At that time and place certainly there was something said about the execution of some papers by myself and Mr. Taft. He was to indorse the Estrella Vineyard Company's note for \$2,000 after he had signed the contract. He went with me to the office of Butler and Forsyth and signed the contract that day. [Paper handed witness.] That is the contract Mr. Taft signed on the eleventh day of May. That is George W. Taft's signature; I saw him sign it." Plaintiff objected to the admission of the contract as irrelevant, immaterial, and incompetent, and on the further ground, "that it purports to be an indenture of mutual covenants, and that it was not executed by the party defendant; that it has never been delivered." The witness continued: "There must have been two papers signed at that time. There is generally the duplicate and this one. My signature, I presume, was on the other one, the signature of Butler and Forsyth. There were two papers. I handed one to Mr. Taft and kept the other. They were identical. It was an oversight I didn't sign this paper before yesterday. I didn't think it was necessary. I had Mr. Taft's signature on that document, and it was all I supposed was necessary." The objection was then sustained, and defendants excepted. This agreement is dated May 11, 1894, and purports to be between George W. Taft, of the county of Fresno, and defendants; throughout the contract the party of the first part is Taft, and the conditions in terms are to be performed by him on the part of first party, and the agreement is signed G. W. Taft. Forsyth further testified, without objection: "The contract under which I received those raisins is the paper

marked defendant's proposed exhibit No. 1 [the contract last referred to]. After the execution of that contract I never entered into or attempted to enter into any other contract with Mr. Taft in relation to the delivery of these raisins." Upon cross-examination of Forsyth, plaintiff handed him a contract dated May 16, 1894, in all particulars identical with that testified to by Forsyth, except that the party of the first part is plaintiff instead of Taft. Forsyth recognized his signature to the contract of May 16th, but was unable to remember anything about its execution; he testified that he had "forgotten all about it." As to the contract of May 16th, when asked where it had been since its execution, Taft testified: "Part of the time at my office and part of the time at Mr. Welsh's. It was never delivered to Butler and Forsyth, because I had instructions from the company at the time they sent it to me not to deliver it unless it was for the best possible means that I could do in the way of disposing of the raisins." He had already testified to the subsequent parol agreement of August.

Taft further testified: "If at any time during the month of May, June, or July, and before August 15th, I signed a raisin contract to the Raisin Growers' Packing Association, I had no authority to sign it from the company"; and in that connection said: "I spoke this morning of some papers having been drawn and sent down for execution to Bakersfield. They were contracts between Butler and Forsyth and the plaintiff corporation. That was a little after this chattel mortgage was sent down, I think, probably within a week." The mortgage was dated May 14th. Defendants' counsel claim that the contract was admissible because: 1. It appeared by its terms to be in duplicate; 2. Taft did not deny that he executed it; 3. Forsyth testified that he saw Taft sign it; 4. That Forsyth said he presumed that the signature of Butler and Forsyth was on the other copy; 5. Forsyth testified that defendants received the raisins under this contract. The general rule, subject to some exceptions, is that in order to bind the principal, and to make it his contract, the instrument must purport on its face to be the contract of the principal, and his name must be inserted in it and signed to it, and not merely the name of the agent, even though the latter be described as agent in the instrument; or at least the

terms of the instrument should clearly show that the principal is intended to be positively bound thereby, and that the agent acts plainly as his agent in executing it. (Story on Agency, sec. 147.) It is not necessary to point out the distinction made between instruments under seal and not under seal; nor to show what classes of instruments fall under the exceptions to the rule. There was nothing on the face of the instrument to show that Taft was acting as agent of any person; no reference whatever is made to plaintiff as principal or otherwise, and no offer was made to prove that Taft was acting for plaintiff and with its authority in executing the contract. It was not enough to show that defendants received the raisins under this contract; it was necessary also to show or offer to show, before it was admissible to bind plaintiff, that the latter authorized Taft to make the contract or the plaintiff delivered the raisins to defendants with knowledge, actual or implied, that the contract was so entered into on its behalf. As an exception to the general rule as above stated, evidence is admitted, not to contradict the written instrument, or deny that it binds the person whom on its face it purports to bind, but to show that it also binds another, because the act of the agent in signing the agreement, in pursuance of his authority, is in law the act of the principal. (Story on Agency, sec. 160a and notes, and sec. 270 and notes.) The only written contract of which there is any evidence that plaintiff had knowledge, or signed, or authorized to be signed, was the contract of May 16th, and as to this contract the undisputed evidence is that it was never delivered by plaintiff, and defendants make no claim under it, and Taft testified that he had no authority to sign the contract of May 11th. We cannot say that the court erred in excluding the latter contract.

4. The trial court admitted evidence of the quality of the raisins under the first cause of action, and generally of their market value at Fresno, and these rulings are assigned as error. Taft testified that the agreement called for raisins of good quality, and we think it was competent to show that they were such. As to the evidence of market value at Fresno, we think it was admissible. The evidence tended to show that the raisins were sold in that market to be delivered at Fresno. Taft testified: "I did not know what he was going

to do with them [the raisins] ; I did not know that they were to be shipped on consignment ; couldn't tell whether to ship east, or where ; . . . I did not care what they done with them." There was evidence tending to show that there was a market value for raisins at Fresno, and several witnesses testified what that market value was. The evidence presents a different case from that of *Pugh v. Porter Brothers Co.*, 118 Cal. 628, relied upon by defendants, in which the raisins were sold to be marketed at Chicago.

5. The court instructed the jury on its own motion. Thereupon defendants submitted ten additional instructions, all of which the court refused to give, and this is assigned as error. Our attention is invited to the sixth, seventh, tenth, eleventh, fourteenth, and sixteenth. The instructions marked 7, 10, and 14 are clearly an invasion of the prerogative of the jury, being instructions upon questions of fact. The sixth gives the rule as to burden of proof, upon which the court fully instructed the jury. The eleventh instruction refers to a contract under which the raisins are assumed to have been delivered, but it is impossible to say whether the contract referred to was the contract alleged by plaintiff or by defendant. As offered, the jury could not have been aided by the instruction and might have been misled. There is no point in the sixteenth instruction not covered by the instruction given quite as favorably as defendants could fairly ask. Indeed, we think the court erred, if at all, in giving instructions under which the jury could render a verdict (as it evidently did) for less than the contract testified to by Taft would have warranted.

It is advised that the judgment and order should be affirmed.

Haynes, C., and Cooper, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are affirmed.

McFarland, J., Temple, J., Henshaw. J.

Hearing in Bank denied.

[S. F. No. 1477. Department One.—June 26, 1899.]

HATTIE PATCH, Appellant, v. **CHARLES A. MILLER**,
et al., Executors, et cetera, Respondents.

JUDGMENT UNSUPPORTED BY FINDINGS—MOTION—CUMULATIVE REMEDY—APPEAL—REVERSAL.—The remedy by motion in the superior court to set aside and vacate a judgment unsupported by the findings, and to enter another judgment in accordance therewith, provided for in the new sections 663 and 663½ of the Code of Civil Procedure, is merely cumulative; and was not designed to supersede the remedy by appeal provided in section 963 of that Code. Upon such appeal, the judgment may be reversed, and the court below directed to enter the judgment required by the findings.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. **Edward A. Belcher**, Judge.

The facts are stated in the opinion.

Marcus Rosenthal, for Appellant.

William H. Schooler, and **Jacob Samuels**, for Respondents.

GRAY, C.—Action for work and labor. Plaintiff claimed seven hundred and twenty dollars to be due her and appeals from a judgment in her favor for two hundred dollars.

The defendants are sued as executors of the last will and testament of **J. M. Miller**, deceased. The court found in the second finding as follows: "That for and during the period of two years immediately preceding the time of the decease of said **J. M. Miller**, hereinafter mentioned, the said plaintiff, at the special instance and request of said **J. M. Miller**, rendered and performed certain work, labor, and services to and for the said **J. M. Miller**, and that such work, labor, and services were and are of the reasonable value of twenty-five dollars per month." The seventh finding is to the effect that no part of the claim has been paid.

The above is all that is said in the findings as to the length of time that plaintiff worked for deceased, and, while it is not as clear a statement of the fact as might have been made, yet we think a fair construction of its language will make the finding mean that the plaintiff worked for deceased two

years or twenty-four months, and that the reasonable value of such work was and is twenty-five dollars per month. Upon this construction of the findings the judgment should have been for six hundred dollars in plaintiff's favor.

It is insisted that plaintiff's remedy for an inconsistency between the judgment and finding is not by appeal from the judgment, but is to be obtained under the provisions of the new sections added to the Code of Civil Procedure in 1897, and numbered 663 and 663½ (see Stats. 1897, p. 58), by a motion in the trial court to vacate and set aside the judgment and enter another and different judgment. We do not find anything in these added sections to indicate that it was the intention of the legislature to repeal or in any way modify section 963 of the Code of Civil Procedure, which provides for an appeal from a final judgment. It would, therefore, seem that an appeal from a final judgment entered in the superior court has the same effect and is to be heard and determined in the same way as before the enactment of the added sections. We hold that those sections were not intended to affect the remedy by appeal already existing, but were intended to provide a remedy in addition thereto, and advise that the judgment be reversed and that the cause be remanded, with directions that the court below enter judgment for plaintiff for six hundred dollars and costs.

Haynes, C., and Chipman, C., concurred.

For the reasons given in the foregoing opinion the judgment is reversed and the cause remanded, with directions that the court below enter judgment for plaintiff for six hundred dollars and costs, the same to be payable in due course of administration of the estate of J. M. Miller, deceased.

Van Dyke, J., Garoutte, J., Harrison, J.

[S. F. No. 1327. Department Two.—June 24, 1899.]

In the Matter of the Estate of JOHN WALKER, Deceased.
J. M. WALKER, Appellant, v. J. L. WALKER, Respondent.

ESTATES OF DECEASED PERSONS—FINAL ACCOUNT OF ADMINISTRATOR—

DEBT CHARGEABLE AS MONEY—LIABILITY OF SURETIES.—In the settlement of the final account of an administrator, he is to be charged with a personal debt due from him to the decedent, as money on hand; and his sureties are bound for so much of the debt as he has had the means to pay.

ID.—INSOLVENCY OF ADMINISTRATOR—FICTION OF LAW—INJUSTICE NOT ALLOWED.—The debt due from an insolvent administrator is not for all purposes to be regarded as money on hand; but it is so regarded by a fiction of law, which can only subsist with justice, and should not be allowed to work injustice either by charging the administrator with contempt or embezzlement, in not paying over moneys not received, and which he was wholly unable to pay, or by charging the sureties with liability beyond the faithful discharge of the duties of the administrator.

ID.—FORM OF DECREE SETTLING ACCOUNT—SHOWING AS TO DEBT.—In case of insolvency of the administrator, and his inability to pay the debt to the estate, which has remained uncollected without his fault, the proper form of the decree in settling his final account is to charge him with the entire sum, including the debt due from himself, and then to show what portion of the amount consists of debts due from the administrator to himself.

ID.—OFFERED PROOF OF INSOLVENCY—DECREE SETTLING ANNUAL ACCOUNT.—The rejection of offered proof of insolvency upon the settlement of the final account of the administrator, is without injury, where the decree settling the annual account offered by the contestant, shows that the administrator was charged therein, not for money actually received, but for a debt due from him to the estate. Either such offered proof, if admitted, or such decree, entitles the administrator to a final decree showing on its face what portion of the money charged against him is for such personal debt due.

APPEAL from a decree of the Superior Court of Sonoma County, settling the final account of an administrator. S. K. Dougherty, Judge.

The facts are stated in the opinion of the court.

J. M. Thompson, for Appellant.

The fiction of law that a debt of an administrator is to be considered as money on hand, is based upon the supposed ability of the administrator to pay; and ought not to be allowed to work injustice against an insolvent administrator, or his sureties. (*McCoy v. Allen*, 9 Ohio C. C. 607; *Lyon v. Osgood*, 58 Vt. 707; *In re Georgi*, 47 N. Y. Supp. 1061; 21 Misc. Rep. 419; *McCarty v. Frazer*, 62 Mo. 263; *Baucus v. Stover*, 89 N. Y. 1; *Baucus v. Barr*, 107 N. Y. 624, affirming 45 Hun, 582; *Keegan v. Smith*, 39 N. Y. Supp. 826; Woerner on Administration, secs. 311, 512, and cases there cited; *Rader v. Yeargin*, 85 Tenn. 486; *Harker v. Irick*, 10 N. J. Eq. 269; 7 Am. & Eng. Ency. of law, 218, and cases there cited.)

J. R. Leppo, for Respondent.

The order settling the previous annual account was conclusive against the administrator, as to the balance in his hands, no appeal having been taken therefrom, and could not be departed from in the final account. (*In re Coutts*, 100 Cal. 403, 404; *Miller v. Lux*, 100 Cal. 614; Code Civ. Proc., secs. 1637, 1908.)

TEMPLE, J.—The appellant, J. M. Walker, is the administrator of John Walker, deceased, and the appeal is from the decree settling his final account as administrator, he having resigned his trust.

Before the death of John Walker appellant was indebted to him in the sum of eight thousand dollars, with interest, and alleges that he was at the time of his appointment, and ever since has been, entirely insolvent. Upon the settlement of his final account he offered evidence to prove his insolvency, and that the debt due from him to the estate remained uncollected without his fault. An objection was made to the offered evidence on the ground of incompetency, irrelevancy, and immateriality, and because the matter has been adjudicated and settled in the decree settling the annual account. For the purposes of this appeal, therefore, the evidence rejected must be deemed sufficient to establish the fact that the debt was uncollectible, and the controversy is as to its materiality. It may be remarked here, however, that insolvency might not be a reason for

not charging the administrator, even if the view contended for by the appellant be correct. One may be insolvent and yet be able to pay a particular debt. He may have some property and yet not enough to pay all his debts, and if in law he could prefer one creditor over another, which ordinarily he may, then it was his duty as administrator to pay this debt so far as he could.

The appellant admits that the general rule is that the administrator is to be charged with a debt due from him to the estate as money on hand, but contends that he may show, at least on his final settlement, that he has never at any time while administrator had the means to enable him to pay the debt or any part thereof. Further than this, unquestionably, the contention could not logically go, since, as he cannot sue himself, and yet it is his duty to collect the debt for the estate, he must be held officially liable for any money he could have so applied at any time during his official term. If he has not so applied it, he has not faithfully executed the duties of his trust according to law, and his sureties may also be held; for it is so nominated in the bond. But in this case it stands, for the purposes of this appeal, admitted that the administrator has at no time during his term had one dollar which he could have so applied; and the decree finds and adjudges that he has something over ten thousand dollars in cash on hand, which decree renders him liable to be imprisoned for contempt for not paying over as directed, and perhaps liable to prosecution for embezzlement, and constitutes an estoppel against his bondsmen, who will in consequence be required to pay money to the estate which has not been lost by the administrator, and which otherwise the estate would never have received. They have not only become liable for the faithful discharge of his duties, which is all they expressly undertook, but also that the administrator is solvent and will pay his indebtedness to the estate.

In other words they are held liable, although the administrator has in fact faithfully performed the duties of his trust according to law, because of a fiction of the law, that money due from such an administrator shall, as against him be deemed money in hand. All fictions of the law, we have been taught, were created to enable the court to do justice and where to indulge a fiction is to cause injustice

its just limit has been found. *In fictione juris semper æquitas existit*. The courts have not considered the debt from an insolvent administrator or executor to the estate money in hand, for all purposes. When an application is made to sell property to pay debts, it is no reply to say that the administrator has sufficient money in hand for that purpose—if this be fictitious money consisting of a debt due from an insolvent executor. It is then regarded as an uncollectible asset. (*In re Georgi*, 47 N. Y. Supp. 1061; 21 Misc. Rep. 419.) Even in Massachusetts, where the doctrine is more strictly adhered to, and where it is held that the sureties are bound for the debt of an insolvent administrator (*Stevens v. Gaylard*, 11 Mass. 269; *Winship v. Bass*, 12 Mass. 198), it was nevertheless held that if the debt is secured by a second mortgage the estate could redeem from a sale made under the first. (*Kinney v. Ensign*, 18 Pick. 232.) Of course, if the money had been paid the lien was discharged and the estate had no right to redeem, but Judge Shaw said: "The taking of administration by a debtor is not, in fact or in law, to all purposes payment of the debt; as between the administrator himself and those beneficially interested in the estate, he is held to account for it as a debt paid, from convenience and necessity—because the administrator cannot sue himself, and cannot collect his own debt in any other mode than by crediting it in his administration account. On technical grounds, as well as on considerations of policy, an administrator is not permitted to show that he could not collect a debt due from himself. But this is in the nature of an estoppel; and it is a well-settled rule that, although a party is bound by an estoppel as of a fact proved or admitted, yet it shall not be taken as a substantial fact, from which other facts can be inferred, . . . but such a legal fiction will never be allowed to work wrong and injustice." So the estate was allowed to redeem, which it would have had neither the occasion nor the right to do if it already had the money due from its debtor.

The force of the last case may be somewhat weakened by the subsequent case of *Tarbell v. Jewett*, 129 Mass. 457. No question is raised in that case, however, as to the effect the insolvency of the administrator might have upon the question. I am not disposed to deny that, so far as the ad-

ministrator has the means to pay, he and his sureties may be charged with the money as in the hands of the administrator.

In the case of *Baucus v. Stover*, 89 N. Y. 1, while the court strenuously insists that the debt must be deemed collected, it nevertheless holds that it will not for all purposes stand on the same footing as money collected. He, the administrator, cannot be committed for a contempt for not paying it over in pursuance of a final decree. Here it is interesting to ask, why? It has been solemnly adjudged that he actually has the money in hand, and, of course, that being so, he can and should pay it over. Is not the mistake in allowing a decree so absolute to be entered?

In fact, it was also said that it would be well for the surrogate in the decree charging the executor with the debt as so much money "to specify the charge thus made separately, so as to save all the rights of the executor and to protect him against consequences which ought not to follow from such a charge." Whether the sureties would be bound for the debt under such a decree the court expressly declined to decide.

This was the case of an executor, and the state of New York has a statute from which section 1447 of our Code of Civil Procedure was taken. The two provisions are practically identical. The court was applying the language of the statute to the case and felt bound by its absolute terms.

The appeal was from a decision of the general term, reported 24 Hun. 109. The lower court was reversed, but the appellate tribunal seems to have been impressed with the views of the lower court, and apparently attempted to avoid some inconveniences pointed out in an able opinion rendered by Judge Bockes. Judge Bockes thought while the executor might be held liable to the estate he should not be made subject to be imprisoned for debt, as he would be if charged by such a decree. Nor should his sureties be made to pay his individual debt if it has not been lost by his failure to do his duty as executor. The court of appeals met these objections by suggesting to the probate court to show by its decree how much was real money in the hands of the executor and how much was constructive money. The constructive money may be a just liability against the executor, but the fiction becomes an unjust reality when

the charge is entered, without qualification, in the final decree.

The sequel to the case of *Baucus v. Stover*, *supra*, was a suit on the bond against the executor and his sureties. The appeal to the supreme court is reported in 45 Hun., 582. It was held that the decree was not conclusive against the sureties nor against the executor in a contempt proceeding. This, as the court determined, was in accordance with the ruling in *Baucus v. Stover*, *supra*, and of the following cases from other states: *Harker v. Irick*, 10 N. J. Eq. 269; *Ordinary v. Kershaw*, 14 N. J. Eq. 528; *McCarty v. Frazer*, 62 Mo. 263; *Garber v. Commonwealth*, 7 Pa. St. 265; *Piper's Estate*, 15 Pa. St. 533.

The court said that the sureties did not agree to augment the estate, but that the executor would not waste it or be in default, that the executor was not in default and there was no deficiency to make good. He had all that had come to his hands and all that by the greatest diligence he could get. All this he was ready to distribute; more he could not do, unless he could make something out of nothing. This judgment was affirmed. (*Baucus v. Barr*, 107 N. Y. 624.)

Sureties are usually entitled to be subrogated to the securities held by the creditor. Here they would succeed to the debt against the administrator. They are simply compelled to purchase a worthless debt which they did not guarantee. Is it possible that this legal fiction can work such a result? The estate has lost nothing by the administration. By the procedure recommended in *Baucus v. Stover*, *supra*, as to the form of the decree settling the final account, the estate would still retain the personal demand against the administrator, changed to a judgment. And there being no official delinquency, except that created by the fiction which must stop where equity fails to go with it, there can be no reason for holding the sureties. They are considered as estopped by the decree founded, not on a fact, but on the fiction. The administrator, so far as the decree can subject him to imprisonment for failing to pay over the money, has equal reason to complain of its form.

The same conclusion was reached in a different way by the supreme court of Vermont in *Lyon v. Osgood*, 58 Vt. 707. It was a suit in equity by a surety to reform the decree because it charged the executor with his entire personal debt,

whereas it was alleged he had the means to pay only a part of it. The relief was granted, the court saying that the executor should not be charged for his personal debt beyond his actual ability to pay, "for only to that extent does he by his appointment receive money from himself belonging to the estate. And again the authorities are cited. They need not be repeated here. Unquestionably there is a conflict, but Woerner in 2 American Administration, 1140, states that sureties are held not bound when the administrator is utterly insolvent in Indiana, Maine, Wisconsin, New Jersey, New York, Oregon, Pennsylvania, Tennessee, and Vermont.

If this view is to prevail, there may arise a question as to the proper form of entering the decree settling the final account. It seems to me the mode suggested in *Baucus v. Stover*, *supra*, is a proper method, and that the decree involved here should be so modified. The administrator should be charged with the entire sum, including the debt due from himself, and the decree should then show what portion of that amount consisted of debts due from the administrator which he reported as cash on hand. Of course, if it appears that he actually has the money, this formula would be unnecessary.

But under such a decree the administrator might be able to purge himself of contempt, and the sureties, if it should be held to be a defense—for that is not involved here—could show that some portion of it the administrator never had the means to pay. And the heirs could still proceed against the administrator and collect the amount from him if he acquired the means.

The case of *Treweek v. Howard*, 105 Cal. 434, is much relied upon by respondent. That was against the sureties of an executor. That decision was based upon the estoppel of the decree and upon section 1447 of the Code of Civil Procedure, which was construed to mean that the liability of the executor for such debt was in all respects the same as for money in his hands.

That decision may be justified by the estoppel of the decree. The question is not so presented here. So far as it is based upon the statute, it is apparently in conflict with the cases in New York construing the statute from which

our code provisions are taken. This is, however, not the case of an executor. The code lays down no such rule in regard to administrators. They are still left under the common-rule law rule, under which, as we have seen, the debt due the estate from an insolvent administrator is not for all purposes regarded as money on hand, but is so regarded only by a fiction of law which can only subsist with justice.

I do not see under this view that the appellant was injured by the ruling rejecting the offered evidence. The court should perhaps have permitted the evidence to be given, but the only relief it could have entitled him to receive is warranted by the evidence put in by the contestant. The decree settling the annual account, including the findings, show that the administrator was charged, not for money actually received, but for a debt due from him to the estate. In *Miller v. Lux*, 100 Cal. 609, it was held that the decree is in reality a judgment and the findings are a part of the judgment-roll. The findings in the matter of the first contest contain a full statement of the facts.

The case is remanded, with directions to modify the decree so that it will appear upon the face thereof that a certain portion of the money in the hands of the administrator, to be stated therein, is for a personal debt due from the administrator to the estate of the decedent.

McFarland, J., and Henshaw, J., concurred.

[S. F. No. 981. Department Two.—June 28, 1899.]

SANTA CRUZ BANK OF SAVINGS, Respondent, v. ARTHUR A. TAYLOR et al., Appellants.

ACTION TO FORECLOSE MORTGAGE—CHANGE OF PLACE OF TRIAL—DISQUALIFICATION OF JUDGE—DENIAL OF MOTION BY SUCCESSOR.—

The ruling upon a motion to change the place of trial of an action to foreclose a mortgage on the ground of the disqualification of the judge, which was taken under advisement by the disqualified judge, and never passed upon, and was again called up for hearing before his successor, who was qualified to try the case, is to be tested by the conditions existing when the motion is passed upon, and the qualified judge may properly deny the motion.

ID.—DUTY OF JUDGE—JURISDICTION OF COURT.—The mere fact that the disqualified judge had no discretion, and could not have retained the case, or have called in another judge, did not deprive the court of jurisdiction of the action to foreclose the mortgage which was not in fact removed; and when the judge of that court became qualified to try the action, before the motion to change the place of trial was passed upon, there was no longer any foundation for the motion, and it was the duty of the qualified judge to retain the case.

APPEAL from an order of the Superior Court of Santa Cruz County refusing to change the place of trial. Lucas F. Smith, Judge.

The facts are stated in the opinion of the court.

Charles B. Younger, for Appellants.

William T. Jeter, for Respondent.

TEMPLE, J.—This action was brought in the county of Santa Cruz, to foreclose a mortgage, on the fifth day of July, 1895.

The defendant, Mary P. Taylor, appeared and filed a demurrer to the complaint December 17, 1895. On the thirtieth day of January, 1896, which was within ten days after the service of summons upon the said Mary P. Taylor, she again appeared and filed her affidavit of merits and moved the court to change the place of trial because the judge of the court was disqualified. When the motion to change the place of trial was submitted does not appear, but it is stated in the bill of exceptions that it was submitted while Hon. James H. Logan was superior judge of the county. Perhaps it was submitted near the end of Judge Logan's term, but, at all events, the motion was taken under advisement by Judge Logan and was never passed upon by him, although it was admitted upon the hearing of the motion that Judge Logan was disqualified.

In March, 1897, counsel for plaintiff called up the motion before Hon. Lucas F. Smith, who had succeeded Judge Logan, and the motion was by him denied and defendant excepted. It was not claimed that Judge Smith was disqualified.

Undoubtedly, it was the duty of Judge Logan promptly to transfer the cause to the nearest and most accessible county,

where the like objection did not exist, and he had no discretion in the matter except to determine which court was the proper court under the statute. (*Krumdick v. Crump*, 98 Cal. 117.) But Judge Logan went out of office without taking any action in the matter, and when he ceased to be judge there was no foundation for the motion. It was no longer true that the superior judge of the county was disqualified, and the statute no longer authorized or required the transfer of the cause.

The fact that Judge Logan had no discretion and could not have retained the case, or have called in another judge, did not deprive that court of jurisdiction, and when the judge himself became qualified to try the action it was his duty to retain the case as against such a motion. The statute does not authorize a transfer because a person who is not a judge of the court, and could not sit as judge in the case, could not act as judge if he had in fact been judge. The reason why the judge of the county cannot call another to try the case is stated in *Krumdick v. Crump, supra*. It is that the judge shall neither try his own case nor select his judge. This case is not within the evils provided against by that rule. Judge Smith's ruling must be tested by the conditions which existed when it was made.

The order is affirmed.

McFarland, J., and Henshaw, J., concurred.

Hearing in Bank denied.

[Crim. No. 55. In Bank.—June 28, 1899.]

THE PEOPLE, Respondent, v. JOSEPH CLARK, Appellant.

CRIMINAL LAW—DETERMINING PROBABLE CAUSE FOR APPEAL—ABSENCE OF TRIAL JUDGE—TEMPORARY STAY.—Where, owing to the absence of the trial judge on vacation, no application can be made to him for a certificate of probable cause for appeal from a judgment of imprisonment in the state prison, and other judges of the same court refuse to grant a stay of proceedings during his absence, as they might do, the appellate court will not make the usual order staying proceedings until the record can be presented to this court,

but will order a stay until the trial judge returns and hears the application for a certificate of probable cause or until some other judge of the same court, appointed to act in his place, has heard and decided it.

1D.—RIGHT OF APPELLANT.—The appellant from a judgment of conviction of a felony has a right to have it determined by the trial court, or by a justice of this court, whether there is probable cause for his appeal and to have a stay of proceedings in a proper case; and is entitled to a reasonable stay until the matter can be determined.

APPLICATION in the Supreme Court for a stay of proceedings upon appeal from a judgment of imprisonment in the state's prison rendered in the Superior Court of the City and County of San Francisco. Frank H. Dunne, Judge.

The facts are stated in the opinion of the court.

L. P. Boardman, for Petitioner.

BEATTY, C. J.—It appears by an affidavit filed herein that the defendant above named has appealed to this court from a judgment of imprisonment in the state prison imposed by the superior court of the city and county of San Francisco, that the judge before whom he was tried is absent from said city and county on vacation, that the presiding judge of said court is also absent, and that the judge temporarily acting in his place refuses to grant any stay of proceedings pending the return of said trial judge. The result is, that the defendant is compelled to apply here for relief to which he was clearly entitled on application to the superior court, and that unless he can obtain a stay of proceedings here he must be deprived of an undoubted statutory right—the right, that is to say, of having it determined by the trial judge, or by a justice of this court, whether there is probable cause for his appeal, and, in case it is found that there is such probable cause, to have the proceedings stayed. (Pen. Code, sec. 1243; *Matter of Adams*, 81 Cal. 163.)

It is beyond question that a part, and a very important part, of the right of appeal, in cases of this kind, is the right to a stay of proceedings in a proper case, and if the judge of the trial court refuses or neglects to pass upon the question whether there is probable cause for the appeal, or improperly

denies a certificate to that effect, the appellant has the right to apply to a justice of this court for such certificate and, as we have said more than once, is entitled to a reasonable stay of proceedings until the record can be made up and certified here for examination. For these reasons, and because some judges of the superior court have refused to grant the stay necessary to enable the appellant to present his application to a justice of this court, we have been compelled, in the exercise of our appellate jurisdiction, to make such orders ourselves.

The present case, however, presents the matter in a new aspect. Owing to the absence of the trial judge on vacation, no application can be made to him, and other judges of the same court, although they undoubtedly have the power to stay the proceedings during his absence, refuse to do so.

We will not, therefore, make the usual order staying proceedings until the record can be presented to a justice of this court, but will make such order as should have been made in the superior court, viz., an order staying proceedings until the trial judge returns and hears the application for a certificate of probable cause, or until some other judge of the same court appointed to act in his place has heard and decided it.

It is so ordered.

Henshaw, J., McFarland, J., Temple, J., Van Dyke, J., and Harrison, J., concurred.

[Sec. No. 504. In Bank.—June 29, 1899.]

JOHN F. CAMPBELL et al., Respondents, v. MARY C. DRAIS, Executrix, et cetera, and W. N. RUTHERFORD, Executor, et cetera, Appellants.

ESTATES OF DECEASED PERSONS—SALE OF REAL ESTATE—ORDER TO SHOW CAUSE—SERVICE OF NOTICE.—A probate sale of real estate made without the order to show cause required by section 1537 of the Code of Civil Procedure, and without the service or publication of notice required by section 1539 of that Code, is invalid and void.

- ID.—WAIVER OF NOTICE TO MINOR HEIRS—AUTHORITY OF APPOINTED ATTORNEY.**—The attorney appointed by the court to represent minor heirs, has no authority to represent them in a proceeding to sell the real estate of the decedent, until after the court has obtained jurisdiction of their persons by the service of notice upon them; and he has no authority to waive such notice.
- ID.—APPEARANCE OF APPOINTED ATTORNEY—PROOF OF SERVICE OF NOTICE.**—The provision of section 1718 of the Code of Civil Procedure, as it stood in 1874, that the appearance of the appointed attorney is sufficient proof of service of notice on the parties he represents, implies that there must be notice to the parties and service thereof in fact prior to such appearance; and when the contrary appears affirmatively, such attorney could not waive both notice and service.
- ID.—AVOIDANCE OF PROBATE SALE—STATUTE OF LIMITATIONS—RECOGNITION OF TITLE OF HEIRS—TENANCY IN COMMON.**—The statute of limitations of three years prescribed by section 1573 of the Code of Civil Procedure, within which the heirs of the decedent may avoid a sale made by an executor or administrator, does not run where it appears that the heirs had no cause of action against the purchaser; and where the purchaser recognized the title of minor heirs, and held and continued to hold for them during their minority and after their majority, as tenant in common with them, they have no cause of action against him and are not barred by that section of the code during such recognition of their title, and holding of the purchaser for them.
- ID.—QUIETING TITLE OF HEIRS—NOTICE TO MORTGAGEE OF PURCHASER—DEED UNDER FORECLOSURE—RUNNING OF STATUTE.**—The statute of limitations does not begin to run against an action by the heirs of the decedent to quiet their title, in favor of a defendant who claims title under the foreclosure of a mortgage executed by the purchaser at a void probate sale, and who took the mortgage with notice of the rights of the heirs, until the mortgagee received the sheriff's deed, and attempted to obtain possession thereunder, adversely to the heirs.
- ID.—DEFENSE TO FORECLOSURE—CAUSE OF ACTION BY HEIRS.**—The heirs could not set up their paramount title as a defense in the action to foreclose the mortgage; and they were not called upon to commence any action until an adverse right was claimed under the sheriff's deed.
- ID.—RETURN OF MONEY PAID—ESTOPPEL.**—The return of the portion of the purchase money received by the minor heirs upon distribution of the estate, need not be returned to one who obtained a sheriff's deed under foreclosure of a mortgage against the purchaser at the probate sale, as a condition of quieting their title against him; nor can he claim any estoppel as against the heirs where he took his mortgage with notice of their rights.

APPEAL from a judgment of the Superior Court of San Joaquin County and from an order denying a new trial.
Joseph H. Budd, Judge.

The facts are stated in the opinion of the court.

Nicol & Orr, W. B. Nutter, and Minor & Ashley, for Appellants.

The cause of action is barred by the provisions of sections 1573 and 1574 of the Code of Civil Procedure, which absolutely preclude recovery by heirs of property sold by an executor or administrator unless action is brought within three years next after the settlement, of the final account of the executor or administrator, or three years after the removal of disability. (*Harlan v. Peck*, 33 Cal. 520; 91 Am. Dec. 653; *Fisher v. Bush*, 133 Ind. 319; *Richardson v. Butler*, 82 Cal. 175, 181; 16 Am. St. Rep. 101.) The heirs cannot recover the land and retain the purchase price. (*Maple v. Kussart*, 53 Pa. St. 352; *State v. Stanley*, 14 Ind. 412; *Evans v. Snyder*, 64 Mo. 516; *Storrs v. Barker*, 6 Johns. Ch. 166; 10 Am. Dec. 316; *Bumb v. Gard*, 107 Ind. 575; *Fisher v. Bush*, *supra*; *Spragg v. Shriver*, 25 Pa. St. 284; 64 Am. Dec. 698; *Smith v. Warden*, 19 Pa. St. 430; *Commonwealth v. Shuman*, 18 Pa. St. 346; *Robertson v. Bradford*, 73 Ala. 116; Freeman on Void Judicial Sales, sec. 53.) The probate sale is valid as against a collateral attack. (Van Fleet on Collateral Attack, sec. 806; *Burris v. Kennedy*, 108 Cal. 337; *In re Eichhoff*, 101 Cal. 604; *Stuart v. Allen*, 16 Cal. 501; 76 Am. Dec. 551; *Richardson v. Butler*, *supra*; *Dennis v. Winter*, 63 Cal. 17; *Burris v. Adams*, 96 Cal. 667; *Richardson v. Musser*, 54 Cal. 197; *Robinson v. Fair*, 128 U. S. 89, 90.) The mortgage was in fee, and was in effect a conveyance in fee. (*Clark v. Baker*, 14 Cal. 612; 76 Am. Dec. 449.)

Smith & Grant, for Respondent.

The possession of Church, who stood in *in loco parentis* (Civ. Code, sec. 209), and who recognized the title of the minors, was the possession of the minor heirs as being a tenant in common with them (*Tervis v. Hicks*, 38 Cal. 234; *Unger v. Mooney*, 63 Cal. 586, 591; 49 Am. Rep. 100); and the heirs had no cause of action against him, and section 1573 could not apply. (*Gage v. Downey*, 94 Cal. 250, 251.) The probate sale was void. (Code Civ. Proc., secs. 1537-39; *Gharky v. Werner*, 66 Cal. 388; *In re Devoe's Estate*, Myrick's Prob. Rep. 6; *Estate of Mercedes*, Myrick's Prob.

Rep. 75; *Pryor v. Downey*, 50 Cal. 398; 19 Am. Rep. 656; *Burris v. Kennedy*, 108 Cal. 344.) The mortgagee took under the mortgage and foreclosure thereof only the interest of the mortgagor. (*Mahoney v. Middleton*, 41 Cal. 41; *Gates v. Salmon*, 35 Cal. 576; 95 Am. Dec. 139.)

McFARLAND, J.—This is an action to quiet title to the undivided half of a certain piece of land described in the complaint. The plaintiffs are the children and heirs-at-law of John A. Campbell, deceased, who died May 21, 1873, seised in severalty of the whole of said tract of land, and it is conceded that the plaintiffs, as heirs of said decedent, are the owners of the undivided half of the land sued for, unless their title thereto has passed, either by virtue of a probate sale made in the administration of the estate of the decedent in 1874, or has been lost to them by the operation of the statute of limitations. Judgment in the lower court went for plaintiffs, and defendants appeal from the judgment and from an order denying their motion for a new trial.

Appellants claim title, first, as purchasers under the foreclosure of a mortgage made to M. J. Drais, now deceased, by one Church, and contend that Church had title through mesne conveyances by virtue of a probate sale of the property in 1874. We are satisfied, however, that the probate sale was invalid and void. The petition under which the sale was made was filed on the seventeenth day of January, 1874, and is as follows: "The petition of C. A. Campbell, administrator of the estate of said deceased, respectfully shows that heretofore, to wit, on the fourteenth day of October, 1873, petitioner filed his petition praying for an order of sale of certain real estate, and showing the necessity therefor; that owing to a mistake in the inventory on file, the real property set forth in said petition did not belong to said estate; that therefore the order heretofore granted has become ineffectual; that a new inventory has been filed correctly describing the real estate belonging to said estate; that the facts which constitute the necessity for selling the real estate belonging to said estate still exists and are as set forth in said former petition, to which reference is hereby made, and petitioner prays may be taken as a part hereof; that a hotel constitutes a portion of the improvements on the real estate belonging to

said estate, which said hotel contains furniture for the use thereof; that said furniture is worth about two hundred and thirteen dollars and sixty cents. Wherefore petitioner prays that an order of sale be granted authorizing said administrator to sell said real estate and furniture at public sale, and for such further order as may be proper." (Signed by the attorney for the administrator and verified by the latter.) (It appears that a former petition for the sale of the property had been filed October 14, 1873, but that on account of the supposed insufficient description of the property it had been abandoned.) On the same day on which the second petition, above quoted, was filed, to wit, January 17, 1874, the order for the sale was made, and under this order the sale took place; and it is evident that the order for the sale made under these circumstances was invalid and void. Section 1538 of the Code of Civil Procedure provides that to obtain an order for the sale of real property a petition in writing must be made to the superior court setting forth certain facts; and section 1537 provides that, if it appears to the court from the petition that it is necessary to sell the real estate, an order must be made directing all persons interested in the estate to appear before the court at a time and place specified, not less than four nor more than ten weeks from the time of making such order, to show cause why an order should not be granted to the executor or administrator to sell so much of the real estate of the decedent as is necessary; and section 1539 provides that a copy of the order to show cause must be personally served on all persons interested in the estate, including the heirs, at least ten days before the time of hearing, or be published four successive weeks in such newspaper as the court shall direct. In the case at bar no such notice to show cause was made, and no service of any kind was made upon the respondents herein, who at that time were all minors, the oldest of them being only about twelve years old. The respondents contend that the petition did not give jurisdiction because it contained no description of the property to be sold; but if it could be held that a reference to various documents referred to in the petition might, under a very liberal construction, show a sufficient description of the property, still the absence of any order to show cause and

of any service of the notice upon respondents are fatal to the validity of the sale. And this difficulty is not obviated by the fact that one Hall, who had been appointed attorney for minor heirs, did, on the date when said petition was made, file with the court a document of which the following is a copy: "Waiver of notice. The undersigned attorney, appointed to represent the minor heirs during the settlement of said estate, hereby waives notice of hearing of petition for sale of said real estate, and assents to an order of sale as prayed for in said petition, and for the reasons and causes therein stated." The attorney for minor heirs can represent them only in a proceeding which has been duly inaugurated and in which the court has already jurisdiction of the minors by such service of summons or notice as the code provides; he cannot waive their rights, or by any of his acts invest the court with jurisdiction of their persons which it had not already acquired. Section 1718, which provides that "at or before the hearing of petitions . . . for sales of real estate" the court may appoint some attorney to represent minors, evidently refers to some particular proceeding, and, taken in connection with other provisions of the code, clearly contemplates a proceeding in which the court has already acquired jurisdiction of the minors. Such was the ruling of the court touching the appointment of a guardian *ad litem* in *Gray v. Palmer*, 9 Cal. 628, where it was said: "The court had no right to appoint a guardian *ad litem* until the infant was properly before the court"; and in *Galpin v. Page*, 18 Wall. 365, the court say that the record showed "that the district court never acquired jurisdiction over the person of Franklina C. Gray in one of the actions, and therefore had no more authority to appoint a guardian *ad litem* for her in that action than it had to appoint attorneys for the other defendants." These principles apply here; for while probate proceedings are at least *quasi* proceedings *in rem*, yet where the statute provides for the service of notice upon persons the same rule applies as in ordinary civil actions. The probate court, therefore, had no jurisdiction to make the order of sale under which appellants claim, and the sale was invalid and void. The fact that in 1874 section 1718 provided that "the appearance of the attorney is sufficient proof of the

service of the notice on the parties he is appointed to represent" does not change the principle; this language implies that there must be notice to the parties and proof of the service of such notice, and merely means that after such service the "appearance" of the attorney, under certain circumstances, may be taken as sufficient proof of the fact of service. But in the case at bar it appears affirmatively that there was neither notice nor service, and that the attorney undertook to "waive" both.

The court below correctly held that the action was not barred by sections 318, 319, 320, and 1573 of the Code of Civil Procedure, or either of them. The sale under the probate order was made to one Hewitt, to whom in March, 1874, an administrator's deed was given, which purported to convey to Hewitt in severalty the whole of the tract of land of which the undivided half is involved in this action. Hewitt held and occupied the land for a few days, and on March 11, 1874, conveyed the same by deed in severalty to one Cross, who held and occupied the same until February, 1876, when he conveyed the land by deed purporting to convey the whole in severalty to one Church, who at that time entered into the possession of the land, and has been in possession ever since. While Cross was in possession he allowed the widow of John A. Campbell, deceased, to build a house upon a portion of the land and to occupy it with her minor children, and in 1876 Church married the widow, and the children continued to live on the land with Church and their mother during and after their minority. They were raised and treated by Church substantially as if they had been his own children. Perhaps the evidence does not quite warrant the finding of the court that during all this time Church recognized the children as owning an undivided one-half, and held possession as a tenant in common with them. It is probable that for a period exceeding the statutory limitation of five years Church thought that he owned the land in severalty and treated it as if he so owned it. During most of that time, however, the plaintiffs were minors. Sometime between 1886 and 1890 Church told at least one of the plaintiffs that they, the children, had an interest in the property, and in 1890, and before the execution of the mortgage to Drais, under

which appellants claim, he said to all the plaintiffs that they owned one-half. Moreover, before Drais took the mortgage in December, 1890, Church informed him that the children owned one-half, and called his attention to an abstract of title showing that fact, and, after considerable conversation between them upon the subject, Drais agreed to take the mortgage with the knowledge that although it covered the whole title to the land, yet it probably would be good for only an undivided one-half. All the plaintiffs had attained their majority a little more than three years before the commencement of this action, and the final account of the administrator of the estate of Campbell, deceased, had been settled more than three years before the commencement of the action; and therefore appellants contend that the action is barred by section 1573 of the Code of Civil Procedure, which provides that no action shall be maintained for the recovery of an estate sold by an executor or administrator unless it be commenced within three years next after the settlement of the final account; but plaintiffs had no cause of action against Church, for he acknowledged their title and was holding for them as a tenant in common, and they could not have litigated their title in the foreclosure suit because they held by a paramount title and not under the mortgagor. They were not, therefore, called upon to bring any action until the purchasers under the foreclosure judgment sought to gain possession under their title founded upon that judgment.

The money which Hewitt paid for the land at the original administrator's sale was used partly to pay off debts of the estate, and there was a residue which was distributed, and a part of the money so distributed was received by the plaintiffs; and it is contended by appellants that this fact estops the plaintiffs from bringing this suit, and that, at all events, they cannot maintain the suit while retaining that money. Whether minor heirs who are merely passive during the administration of an estate, and enter, themselves, into no contracts, are bound to restore money which comes to them upon a void sale, is a question not necessary to be here determined (see *Hill v. Den*, 54 Cal. 6), for this principle would not apply here; there is no reason why the money, under any view of the law, should be paid to these present appellants,

and there are no elements of estoppel here because Drais took his mortgage having knowledge of the true state of the title, or the means of acquiring it. If the affirmance of the judgment works any injustice to the appellants, we see no way under the law to prevent it.

The judgment and order appealed from are affirmed.

Henshaw, J., Harrison, J., Garoutte, J., and Van Dyke, J., concurred.

Rehearing denied.

Beatty, C. J., dissented from the order denying a rehearing.

[S. F. No. 1588. Department Two.—June 30, 1899.]

ABBIE ROSE WOOD, Administratrix, etc., Respondent, v.
JAMES C. JORDAN, Appellant.

STREET ASSESSMENT—JUDGMENT OF FORECLOSURE—COLLATERAL ATTACK—ACTION TO QUIET TITLE.—A judgment foreclosing the lien of an alleged street assessment upon certain lands rendered in an action in which the owners were made defendants, and were personally served, and appeared and contested the assessment, and failed to appeal from the judgment, is conclusive of the validity of the assessment, and cannot be collaterally attacked on account of invalidity of the assessment in a subsequent action by one claiming title under the sheriff's deed, to quiet his title against subsequent grantees of the defendants in the foreclosure suit.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from orders refusing to vacate the judgment and to render a different judgment upon the findings, and denying a new trial. John Hunt, Judge.

The facts are stated in the opinion of the court.

Charles F. Hanlon, for Appellant.

J. C. Bates, for Respondent.

HENSHAW, J.—Joseph M. Wood in his lifetime commenced this action against James C. Jordan. Upon his death, while the action was pending, his administratrix was substituted as plaintiff in his place.

The action was to quiet title. Plaintiff claimed both by record title and by prescription. He was successful under his

first claim and unsuccessful as to the second. Defendant appeals from the judgment and from the order denying him a new trial.

Plaintiff's record title comes from the sale by the sheriff and his subsequent deed upon foreclosure of certain liens for street assessment upon the land in question. Defendant's title comes by mesne conveyance from the owner of the lands affected by the actions to foreclose the street assessment, the deeds having been made after judgments in the foreclosure suits. The attack upon plaintiff's title is based upon the contention that the judgments in the foreclosure suits were void because of asserted irregularities in the assessments which were the foundation of the actions.

In the actions to foreclose the liens of the street assessments, personal service of the defendants was had. They appeared and contested the action and the validity of the assessments, were defeated and failed to appeal. The court thus had jurisdiction over the person and over the subject matter, and its decree was a finality. It is in the exercise of the taxing power that street assessment liens are imposed upon the land of the property-owner. "Jurisdiction being obtained over the person and over the subject matter, no error in its exercise can make the judgment void. The authority to decide being shown, it cannot be divested by being improperly or incorrectly employed The same rules apply to actions to recover delinquent taxes as in other cases in respect to collateral attacks. It cannot be shown to avoid the effect of such judgments that the taxes were previously paid. Neither will such judgments be in the least affected because it appears from the judgment-roll that the assessment was illegal and void." (Freeman on Judgments, sec. 135.) The conclusiveness of judgments and their freedom from collateral attack have been directly held to apply to judgments for the foreclosure of street assessments. (*Mayo v. Ah Loy*, 32 Cal. 477; 91 Am. Dec. 595; *People v. Doe*, 36 Cal. 220; *Eitel v. Foote*, 39 Cal. 439; *Mayo v. Foley*, 40 Cal. 281; *Crall v. Poso Irr. Dist.*, 87 Cal. 140. See, also, *Hahn v. Kelly*, 34 Cal. 391; 94 Am. Dec. 742.)

The judgments which were the foundations of the sheriff's deeds in question were certainly not void, and, whatever may

be the alleged errors, they may not be reviewed upon this collateral attack.

The judgment and order appealed from are affirmed.

Temple, J., and McFarland, J., concurred.

Hearing in Bank denied.

[S. F. No. 1087. Department Two.—June 30, 1899.]

ABBIE R. WOOD, Administratrix, etc., Respondent, v.
JAMES C. JORDAN, Appellant.

ACTION TO QUIET TITLE—ANSWER SEEKING TO QUIET DEFENDANT'S TITLE—AFFIRMATIVE RELIEF—DISMISSAL BY PLAINTIFF.—In an action to quiet title, an answer setting up the defendant's title and praying for a decree establishing it, and enjoining plaintiff from asserting any interest in the land, or interfering with defendant's possession thereof, does not claim such affirmative relief under subdivision 1 of section 581 of the Code of Civil Procedure, as to preclude a judgment of dismissal of the action at the instance of the plaintiff.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a motion to vacate the judgment. J. C. B. Hebbard, Judge.

The facts are stated in the opinion of the court.

Charles F. Hanlon, for Appellant.

J. C. Bates, for Respondent.

THE COURT.—An action was brought by the plaintiff to quiet his title to certain pieces of land in the city and county of San Francisco, plaintiff alleging that he was in possession. Upon his death his administratrix was substituted in his place. Defendant answered asserting title in himself, denying plaintiff's right of possession, alleging an ouster by plaintiff of defendant's possession, and concluding with a prayer for a decree establishing his title and enjoining plaintiff from asserting any claim to the land, or interfering in any manner with the possession thereof. Thereafter plaintiff procured a dismissal of the action, and a judgment of dismissal was

duly given. Defendant then moved to vacate the judgment of dismissal, and from the order of the court refusing so to do he prosecutes this appeal.

He insists that by his answer he seeks affirmative relief, and that under section 581, subdivision 1, of the Code of Civil Procedure, it was erroneous for the court, under these circumstances, to dismiss the action. But this contention has been definitely settled against him in *Moyle v. Porter*, 51 Cal. 639.

The order appealed from is affirmed.

[S. F. No. 1037. Department Two.—June 30, 1899.]

FRANK S. KNOWLES, Respondent, v. THE CROCKER ESTATE COMPANY et al., Appellants.

FORCIBLE ENTRY AND DETAINER—DEFECTIVE COMPLAINT—ACTUAL POSSESSION OF PLAINTIFF.—In an action for forcible entry and detainer, the complaint must show that the plaintiff was in actual possession of the property, as distinguished from the constructive possession thereof, when it was invaded by the defendant; and if it merely alleges that plaintiff was in the peaceable and undisturbed possession, it is defective upon special demurrer for uncertainty, if not upon general demurrer.

ID.—SPECIFICATION IN DEMURRER FOR UNCERTAINTY.—The specification in a special demurrer to such complaint for uncertainty, in that it could not be ascertained therefrom "what was the character of the alleged possession of plaintiff of the property described," though not very clear, is sufficient to put the plaintiff upon notice that the complaint is objected to for not specifically alleging actual possession.

APPEAL from a judgment of the Superior Court of San Mateo County. George H. Buck, Judge.

The facts are stated in the opinion of the court.

Morrison, Foerster & Cope, and George C. Ross, for Appellants.

B. B. Newman, and Edward F. Fitzpatrick, for Respondent.

THE COURT.—Action founded on an alleged forcible entry upon real property and also a forcible detainer thereof.

In the first count of the complaint it is alleged, among other things, that on November 16, 1896, plaintiff was in the peaceable and undisturbed possession of certain described lands, and that while he was so in possession the defendants with force, et cetera, entered thereon and "in a forcible manner ejected plaintiff and put him out of said real property" and broke down his fences inclosing the same. In the second count of the complaint plaintiff repeats by reference the allegations of the first, and further avers that since the said forcible entry the defendants, by force and menaces and threats of violence, have held and yet hold possession of the land aforesaid. Defendants demurred to each count of the complaint, on the grounds that it does not state facts sufficient to constitute a cause of action, and for uncertainty in that it cannot be ascertained therefrom "what was the character of the alleged possession of plaintiff of the property described." The court overruled the demurrer, and upon the subsequent trial of the cause rendered judgment in plaintiff's favor for restitution of the premises, with treble damages.

The only question of moment made by defendants on appeal concerns the ruling of the court on the demurrer. They urge that the first count of the complaint was bad for that it does not allege actual possession by the plaintiff at the time of the forcible entry. The statute requires that plaintiff shall prove in actions of this nature that he was "peaceably in the actual possession at the time of the forcible entry, or was entitled to the possession at the time of the forcible detainer." (Code Civ. Proc., sec. 1172.) And there is no doubt that in the proceeding for a forcible entry—as in the first cause for action of the complaint here—the plaintiff must show by his pleading that he was in actual possession of the property when it was invaded by the defendant since it is intrusions upon actual possession—as distinguished from constructive—for which the statute was designed to afford a summary remedy. (*Cummins v. Scott*, 23 Cal. 526; *More v. Del Valle*, 28 Cal. 170; *Voll v. Hollis*, 60 Cal. 569, 573, 574; *Ely v. Yore*, 71 Cal. 130.)

This complaint is unquestionably a defective pleading. Whether it is so radically defective as to be open to successful attack upon general demurrer, or whether it may be said that

by way of argument and inference it contains averments sufficient to pass a general demurrer, need not here be decided, for we think it beyond question that the ground of special demurrer was well taken, and the amendment to the complaint which must follow the sustaining of the special demurrer should relieve the pleading from the defect complained of under the general demurrer.

The ground of special demurrer, as above pointed out, was that the complaint was uncertain in that it could not be ascertained therefrom "what was the character of the alleged possession of plaintiff of the property described." It may be conceded that the phrase "character of possession" is in itself one of doubtful import. Still, it is a sufficient specification of the ground of uncertainty if it fairly directs the mind of the pleader to the vulnerable point in his complaint. The law requires that the possession shall be actual. This characteristic of plaintiff's possession is essential to his right to maintain such an action, and we think no pleader could justly say that such a specification was insufficient to put him upon notice that his complaint was assailed for insufficiency or uncertainty in this regard.

The judgment is therefore reversed and the cause remanded, with directions to the trial court to sustain the special demurrer to the complaint, with leave to plaintiff to amend.

Hearing in Bank denied.

[S. F. No. 1153. Department Two.—June 30, 1899.]

WILLIAM SILVEIRA, Respondent, v. NIELS IVERSON
et al., Appellants.

MASTER AND SERVANT—USE OF DEFECTIVE APPARATUS—PLEADING—FAILURE TO AVER NEGLIGENCE.—A complaint in an action by a servant to recover damages for personal injuries, which alleges that the injuries described resulted from the use of defective apparatus described, supplied by the master for the servant's use, with notice of its defective condition, in breach of the alleged duty of the master to supply him with good apparatus of the kind described, states a cause of action; and, at least in the absence of a special demurrer, is not defective in not expressly averring the negligence of the master.

ID.—AVERMENT OF NEGLIGENCE, WHEN REQUIRED.—In cases where the facts stated do not constitute a cause of action unless the alleged acts were done negligently, it must be averred that they were so done, unless the facts themselves necessarily exclude any hypothesis other than that of negligence. But where the facts alleged do of themselves constitute a cause of action, whether done negligently or intentionally, an averment of negligence is not essential.

ID.—DUTY AND LIABILITY OF MASTER TO SERVANT.—From the relation existing between master and servant, it is the duty of the master to supply the servant with sufficient apparatus for his use; and he is liable for personal injuries to the servant resulting from supplying him with apparatus known to be defective, whether his wrongful act was the result of his negligence, or intention, or other cause.

ACTION FOR DAMAGES—JOINT JUDGMENT—AMENDMENT—OMISSION OF DEFENDANT NOT APPEARING—PRESUMPTION UPON APPEAL.—In an action for damages against several defendants, where judgment was rendered jointly against all of the defendants, and the court amended it by striking out the name of a defendant not appearing in the action, it will be presumed upon appeal from the amended judgment, in favor thereof, that the omitted defendant was not served with summons, and that on motion of the plaintiff the action was dismissed as to him, and that the judgment against him was a clerical misprision and a nullity, which was properly stricken out.

APPEAL from the judgment of the Superior Court of the City and County of San Francisco. George H. Bahrs, Judge.

The facts are stated in the opinion of the court.

Gunnison, Booth & Bartnett, and H. W. Hutton, for Appellants.

Negligence is an ultimate fact, which must be expressly averred. (Bliss on Code Pleading, sec. 2116; Maxwell on Code Pleading, 252; *Stephenson v. Southern Pac. R. R.*, 102 Cal. 143; *Louisville etc. R. R. Co. v. Wolfe*, 80 Ky. 84) The allegations as to the duty of the defendants and the disregard thereof are of conclusions of law. (Bliss on Code Pleading, 212; *Buffalo v. Holloway*, 7 N. Y. 493; 57 Am. Dec. 550; *Seymour v. Maddox*, 16 Q. B. 326; *Sammins v. Wilhelm*, 6 Ohio C. C. 565; *Pittsburgh etc. R. R. Co. v. Keller*, 49 Ind. 211.)

F. J. Castlehun, for Respondent.

The complaint states facts showing the duty of the de-

fendants and the breach of that duty, and need not expressly aver negligence. (*Dyer v. Pacific R. R.*, 34 Mo. 127; *Burdick v. Worrall*, 4 Barb. 596; *Durgin v. Neal*, 82 Cal. 597; *Congreve v. Morgan*, 4 Duer, 439; *Buffalo v. Holloway*, 7 N. Y. 493; 57 Am. Dec. 550.) There being nothing in the record to show jurisdiction of the person of Omundsen, the judgment as to him was a nullity, and was properly stricken out as such. (*Hawkins v. Abbott*, 40 Cal. 639; *Barney v. Vigoureux*, 75 Cal. 376; *Alpers v. Schammel*, 75 Cal. 590.) There may be a recovery against one or more of several defendants sued jointly for tort. (Code Civ. Proc., sec. 578; *Tompkins v. Clay Street R. R. Co.*, 66 Cal. 163.) The amended judgment is erroneous in not following the verdict; and if a joint judgment for damages is erroneous as to one defendant, it is erroneous as to all. (*Blanchard v. Gregory*, 14 Ohio, 413; *Saunders v. Harris*, 5 Humph. 345; *McCool v. Mahoney*, 54 Cal. 491; *Boyer v. Shawhan*, 88 Cal. 111.) The release of one joint wrongdoer releases all. (*McCool v. Mahoney*, *supra*; *Coux v. Lowther*, 1 Ld. Raym. 597; *Green v. Charnock*, 1 Croke, 762; *Bell v. North*, 4 Litt. 133.)

McFARLAND, J.—Appeal by defendants from a judgment in favor of plaintiff. Defendants did not interpose any demurrer, but the main point which they now make for a reversal is that the complaint does not state facts sufficient to constitute a cause of action.

It is averred in the complaint that plaintiff was employed by defendants, who were the owners of a certain coasting schooner called the "Ocean Spray," to cook on said schooner and to perform such other services as the captain of the vessel might call on him to perform; that "it was the duty of the defendants to provide said schooner with good, safe, and strong ropes, tackle, and sailing apparatus, but that the defendants, disregarding their duty in that behalf, provided and used an old, worn-out, rotten, and defective reefing pennant, with which to reef the mainsail; of which they had notice"; that on a certain named day "while plaintiff, in obedience to the orders of the captain of the said schooner, was assisting in reefing the mainsail in the usual and proper way, by pulling at the reefing pennant in the usual and proper way, the said reefing pennant broke"; that when the

pennant broke plaintiff was upon the roof of the cabin, which was the usual and proper place for him to be when doing said work; and that "when the said reefing pennant broke, as above stated plaintiff fell backward from the roof of the cabin, a distance of about six feet, striking the deck with his right shoulder," whereby his shoulder was dislocated and other injuries were done to him which are specifically described.

Appellants assail the complaint mainly on the ground that it contains no express averment of negligence—that is, that the word "negligently," or some equivalent word or phrase, is not used in the complaint. Waiving the fact that the answer contains merely denials of the averments of the complaint, and that, in support of the judgment, it must be presumed that the case was tried as if the averments were sufficient, our opinion is that at least in the absence of a special demurrer, the complaint states a sufficient cause of action. It is true that in certain cases where the facts stated do not constitute a cause of action unless done negligently, it must be averred that they were so done, unless the facts themselves necessarily exclude any hypothesis other than that of negligence. But in the case at bar the facts alleged do themselves constitute a cause of action. From the averred relation of the parties it was the duty of the appellants—as averred—to supply a good reefing pennant, and not having done so, and by reason thereof the respondent having been injured, the appellants were liable for damages whether the wrongful act was the result of negligence, or intention, or other cause. The facts alleged constitute a cause of action. The defect in the pennant is sufficiently stated, and it is sufficiently averred that this caused the injury to respondent.

2. There were four named defendants—Iverson, Gerdau and Lassen who were served and appeared and answered, and Omundsen, who did not appear, and as to whom there is no evidence of service; and appellants contend that the judgment should be reversed because, as they say, it was first rendered against all four and was afterward amended by striking out the name of Omundsen. Counsel, to some extent, argue this point as if there were a bill of exceptions showing exactly what occurred with respect to this matter; but there is

nothing before us except the judgment-roll, which contains merely the pleadings, the verdict, and the judgment. The judgment has a reference to Omundsen from which, perhaps, we may conclude that appellants are warranted in claiming that it was first rendered against all four of the defendants, and afterward amended by striking out the name of Omundsen; but granting this, it may be presumed in support of the judgment, that Omundsen was not served with summons and did not appear; that on motion of plaintiff the action was dismissed as to him, and that plaintiff properly proceeded against the other defendants, as provided in section 414 of the Code of Civil Procedure, and that Omundsen was improperly included in the judgment by mistake or inadvertence of the clerk. Under such circumstances, the judgment against Omundsen was a nullity on its face, and appellants were in no way prejudiced by the amendment. It was proper for the court to strike out the name of Omundsen; and if it had not done so this court, on appeal, would have ordered the amendment. (*Alpers v. Schammel*, 75 Cal. 590.)

The judgment appealed from is affirmed.

Temple, J., and Henshaw, J., concurred.

[L. A. No. 598. Department Two.—July 8, 1899.]

M. B. THOMPSON et al., Appellants, v. CITY OF LOS ANGELES, Respondent.

NEW TRIAL—STATEMENT—ABSENCE OF SPECIFICATIONS.—A statement on motion for a new trial which contains no specifications of the insufficiency of the evidence to justify the findings or of errors of law occurring at the trial and expected to by the defendants, must be disregarded on the hearing of the motion.

ID.—ORDER DENYING NEW TRIAL—REVIEW UPON APPEAL—"DECISION AGAINST LAW."—A specification in the notice of the motion for new trial, that "the decision is against law," for any reason appearing upon the face of the judgment-roll, such as a failure to find upon a material issue, or that wrong conclusions of law have been drawn from the findings, can only be considered in this court upon an appeal from the judgment, and will be disregarded where the only appeal is from an order denying a new trial.

APPEAL from a judgment of the Superior Court of Los Angeles County. Walter Van Dyke, Judge.

The facts are stated in the opinion.

Walter F. Haas, for Appellant.

W. E. Dunn, and Francis J. Thomas, for Respondent.

HAYNES, C.—This action is, in form, to quiet title to a narrow strip of land fronting on Soto street, in the city of Los Angeles, the plaintiffs' right to recover depending upon the true location of the line of the street; the defendant's contention being that the strip of land in controversy is a part of said street. Findings and judgment were for the defendant, and plaintiffs appeal from an order denying their motion for a new trial.

The notice of said motion specified as the grounds thereof:

1. That the evidence is insufficient to justify the findings;
2. That the decision is against law; and 3. On account of errors in law occurring at the trial and excepted to by defendant; and that the motion would be made upon a statement of the case.

The statement, however, specifies no particulars in which it is claimed the evidence is insufficient to justify the findings, nor are any errors of law occurring at the trial specified. Section 659, subdivision 3, of the Code of Civil Procedure, provides: "If no such specifications be made, the statement shall be disregarded on the hearing of the motion." The findings, therefore, stand unquestioned and the correctness of the rulings and proceedings upon the trial unchallenged.

Appellants, in their brief, say that the ground for a new trial, more particularly relied upon for a reversal, is that "said decision is against law"; and proceed to discuss the evidence as though its sufficiency, or insufficiency, was the sole question to be considered. But since, in the absence of specifications, we are obliged to conclude that the findings are justified by the evidence and that no errors of law occurred upon the trial, if "the decision is against law" it must be for some reason appearing only in the judgment-roll, as, for example, a failure to find upon some material issue, or that wrong conclusions of law have been drawn from

the findings. There is no appeal from the judgment, however, and upon appeal from an order denying a new trial errors upon the face of the judgment-roll cannot be considered. (*In re Westerfield*, 96 Cal. 113; *Wheeler v. Bolton*, 92 Cal. 159; *Brisson v. Brisson*, 90 Cal. 323.) Besides, counsel for appellant does not in his brief suggest any error of law appearing upon the judgment-roll.

I advise that the order appealed from be affirmed.

Britt, C., and Gray, C., concurred.

For the reasons given in the foregoing opinion the order appealed from is affirmed.

McFarland, J., Temple, J., Henshaw, J.

[Sac. No. 581. Department Two.—July 7, 1899.]

C. H. DARROUGH, Appellant, v. HERBERT KRAFT COMPANY BAND et al., Respondents.

TRUST DEED—PAYMENT BY PURCHASER—RELEASE—UNKNOWN JUDGMENT LIEN—PRIOR SECURITY—SUBROGATION.—A purchaser from the grantor of a trust deed, who has paid off the note secured thereby, and received a release, without actual knowledge of the existence of a subsequent judgment lien upon the premises, is entitled in equity to be treated as the assignee of the note secured by the trust deed, and to be subrogated to the prior security, and to have it revived and enforced as against the holder of the junior lien of the judgment, whose rights cannot be prejudiced thereby, but will be in the same condition as if the trust deed were originally enforced.

ID.—CONSTRUCTIVE NOTICE—DOCKETING OF JUDGMENT.—The constructive notice inferred from the docketing of the judgment does not estop the purchaser, or affect his right to be subrogated to the prior security which was paid off in actual ignorance of the existence of the junior lien of the judgment.

APPEAL from a judgment of the Superior Court of Tehama County. John F. Ellison, Judge.

The facts are stated in the opinion.

Johnson & Chase, for Appellant.

The complaint shows an equitable right in the purchaser to be subrogated to the security of the trust deed, and to have it revived and enforced as against the unknown junior

lien. (1 Jones on Mortgages, secs. 876, 877; 3 Pomeroy's Equity Jurisprudence, secs. 1211-13; 24 Am. & Eng. Ency. of Law, 253; *Barnes v. Mott*, 64 N. Y. 397; 21 Am. Rep. 625; *Arnold v. Green*, 116 N. Y. 566; *Short v. Currier*, 153 Mass. 182; *Matzen v. Shaeffer*, 65 Cal. 81; *Persons v. Shaeffer*, 65 Cal. 79; *Tolman v. Smith*, 85 Cal. 280; *Shaeffer v. McCloskey*, 101 Cal. 576, 580, and cases cited; *Hines v. Ward*, 121 Cal. 115; *Lowman v. Lowman*, 118 Ill. 582; *Everson v. McMullen*, 113 N. Y. 293; 10 Am. St. Rep. 445; *Gerdine v. Menage*, 41 Minn. 417.) The same rule applies to subrogation to a trust deed, as to a mortgage. (*Young v. Morgan*, 89 Ill. 199; *Johnson v. Tootle*, 14 Utah, 482.)

Coffman & Coffman, for Respondents.

The purchase was voluntary, and subject to incumbrances; and the purchaser was not entitled to subrogation. (3 Minor's Institutes, pt. I., pp. 420, 421; 2 Story's Equity Jurisprudence, 340, and note; 3 Pomeroy's Equity Jurisprudence, sec. 1206; 1 Jones on Mortgages, sec. 874; Sheldon on subrogation, secs. 3, 11; *Hough v. Insurance Co.*, 57 Ill. 318; 11 Am. Rep. 18; *Suppiger v. Garrels*, 20 Ill. App. 645; *Booker v. Anderson*, 35 Ill. 96; *Garwood v. Eldridge*, 2 N. J. Eq. 145; 34 Am. Rep. 195; *Bunn v. Lindsay*, 95 Mo. 250; 6 Am. St. Rep. 48; *Bishop v. O'Conner*, 69 Ill. 431; *Bentley v. Whittemore*, 18 N. J. Eq. 366; *Edinburg etc. Co. v. Lathan*, 88 Ind. 88; *Goodyear v. Goodyear*, 72 Iowa, 329; 24 Am. & Eng. Ency. of Law, 259, 260.)

GRAY, C.—A demurrer to the complaint, as amended, was sustained; plaintiff refused to further amend his complaint, and the judgment was entered against him, from which he appeals.

From the complaint and amendments thereto it appears that on May 13, 1893, the defendant Halley executed a note for one thousand and fifty dollars to the defendant Bank of Tehama County, and on the same date, to secure the payment of said note, said Halley executed a trust deed of certain real estate to the defendants Brown and Cahoon, as trustees. Thereafter, and on the 26th of April, 1895, Herbert Kraft recovered and docketed a judgment against

said Halley for six hundred and eleven dollars and seventy-one cents. On April 29, 1895, this judgment was assigned to defendant Kraft Company Bank. On the 13th of May, 1895, appellant purchased from Halley his equitable interest in said real estate for one hundred and twelve dollars, receiving a grant deed therefor, under which he has been in possession of said premises ever since. On May 15, 1895, appellant paid the balance due to the Bank of Tehama County on said note, amounting to upward of eleven hundred dollars, and the said trustees named in said deed of trust made a deed of reconveyance of said real estate to appellant, and appellant had the same duly recorded and the note was marked paid by the bank and surrendered to Halley. Appellant paid this note and took this deed under a mistake of fact; he knowing nothing of the judgment of Kraft, believed the premises to be free from that encumbrance. Had he known of the judgment he avers that he would have taken an assignment of the note and directed the trustees to sell the said real property to satisfy the same. Appellant seeks in this action to be treated as the equitable assignee of said note and to be subrogated to all the rights that the Bank of Tehama County had therein and in said trust deed, to have the said real property sold to satisfy said note, and to have the rights under the aforesaid judgment subordinated to appellant's rights under the trust deed and promissory note, and also to have the Herbert Kraft Company Bank enjoined from selling said real property under execution under said judgment. It appears further that the said real property is of less value than the amount claimed to be due to appellant as equitable assignee of said note.

I am of opinion that the facts stated bring the case within the principles laid down by this court in *Matzen v. Shaeffer*, 65 Cal. 81; *Shaffer v. McCloskey*, 101 Cal. 576; and *Hines v. Ward*, 121 Cal. 115, and that the demurrer should have been overruled. The above cases seem to hold that a junior lienholder shall derive no advantage over a senior lien where such senior lien has been paid off and canceled by the owner of the premises to which the liens attached without actual knowledge, on the part of such owner, of the existence of such junior lien; and that it will be presumed that such

owner made the payment for his own benefit and not for the benefit of the junior lienholder, and for the protection of his interests equity will treat such owner as the assignee of the original senior lienholder, and will revive and enforce such senior lien for his benefit. The cases cited above treat altogether of mortgage liens, but I take it the same doctrines of equity therein discussed are applicable to trust deeds given to secure the payment of promissory notes. I find this same doctrine of "equitable assignment" applied to a trust deed by the supreme court of Illinois in *Young v. Morgan*, 89 Ill. 199. In that case the court held that where a party sold land subject to a deed of trust, which was a prior lien to that of a judgment, the purchaser assuming the payment of the debt secured by the trust deed as a part of the purchase money, and the purchaser paid the same, taking a release of the trust deed instead of an assignment thereof, in equity the lien of the trust deed was not extinguished in favor of the judgment creditor, but that the purchaser was entitled to assert the same for his own protection and have a sale under execution, issued on said judgment, set aside. The court said in that case: "The payment of the debt secured by the trust deed was not a voluntary payment by a stranger, but it was a payment which appellant was compelled to make in order to the protection of his title to this land which he had purchased."

Respondent cites *Guy v. Du Uprey*, 16 Cal. 197, 76 Am. Dec. 518, in support of the judgment, but that case differs as to the facts from the case at bar, for the court therein say: "The person who advanced the money had no interest in the payment of the debt or the release of the mortgage"; and further: "He was fully advised of the facts." In the case under consideration the appellant clearly had an interest in the payment and discharge of the debt, which was an encumbrance upon the land he had bought, and besides he was not "advised of the fact" of the existence of the subsequent judgment lien. The constructive notice inferred from the docketing of the judgment is of no value here and does not estop the appellant to urge that the note was canceled and not assigned because of his mistake arising out of an absence of all knowledge as to the existence of the judgment. (*Shaffer v. McCloskey*, *supra*.)

In *Persons v. Shaffer*, 65 Cal. 79, and *Richards v. Griffith*, 92 Cal. 493, 27 Am. St. Rep. 156, cited by respond-

ent, the prior liens were canceled of record prior to the time the subsequent liens attached, so that the subsequent lienholders and purchasers were in position to claim the rights of *bona fide* purchasers without notice. In this case, however, no such claim can be made, as the trust deed was a matter of record, the land had not been redeemed or the note paid at the time the judgment was docketed and the judgment lien became attached to the land. Respondents were not misled to their prejudice by any act of appellant, and, notwithstanding it be held herein that the appellant is entitled to the relief asked in his complaint, their judgment lien is of no less value to them on that account than when it first attached.

Those objections to the complaint, other than such as are based on the ground of insufficiency of facts to show a cause of action, do not require treatment in this opinion. The propriety of an injunction is not here discussed.

For the foregoing reasons I advise that the judgment be reversed and the cause be remanded, with directions to the court below to overrule the demurrer.

Britt, C., and Cooper, C., concurred.

For the reasons given in the foregoing opinion the judgment is reversed and the cause remanded, with directions to the court below to overrule the demurrer.

Henshaw, J., Temple, J., McFarland, J.

Hearing in Bank denied.

[L. A. No. 487. Department One.—July 7, 1899.]

THOMAS M. CLARK, Appellant, v. CHARLES W. ALLEN, Respondent.

COMPENSATION OF BROKER—EXCHANGE OF LANDS—BRINGING PARTIES TOGETHER—DOUBLE EMPLOYMENT.—A broker will not be allowed to act as agent of both parties, to a contract for the sale and purchase of real estate, and an agreement for compensation from both of them will not be recognized by the courts; but this rule has no application where the broker does not act as an agent, or represent conflicting interests, but acts merely as a middleman to

bring the parties to an exchange of lands together, and has nothing whatever to do with the trade between them. In such case, there is nothing in the relation of the parties to render the broker obnoxious to the charge of double employment; and he may receive compensation from both of the parties, if both agree to pay him.

ID.—QUESTION OF FACT—CONFLICTING EVIDENCE—ORDER GRANTING NEW TRIAL.—The question whether the broker was merely a middleman, or was an agent of both parties, is one of fact to be determined by the trial court; and where there is conflicting evidence, from which the court might find either way, an order granting a new trial after rendering judgment in favor of the claim of the broker for compensation from one party, after having received compensation from the other party, if the new trial appears to have been granted for insufficiency of the evidence, will not be disturbed upon appeal.

ID.—PLEADING—CONTRACT TO MAKE A "DEAL"—PROCUREMENT OF PURCHASER—VARIANCE.—A complaint alleging that under a contract with the defendant to make a "deal" for him respecting a certain piece of property, the plaintiffs procured a purchaser able and willing to purchase the land, is not at material variance with proof showing an exchange of lands, rather than a purchase, especially where the evidence of the exchange was received without objection.

APPEAL from an order of the Superior Court of San Bernardino County, granting a new trial. George E. Otis, Judge.

The facts are stated in the opinion of the court.

Earl A. Rogers, and B. E. Vickrey, for Appellant.

Under the evidence, the brokers had nothing whatever to do with the terms of the sale or exchange, but merely undertook to bring the parties together for a deal between them. In such case, compensation from one party is no defense against a claim of compensation from the other. (*Green v. Robertson*, 64 Cal. 75, 76; *Mullen v. Keetzleb*, 7 Bush, 253; *Rupp v. Sampson*, 16 Gray, 398; 77 Am. Dec. 416; *Childs v. Ptomey*, 17 Mont. 502; *Finnerty v. Fritz*, 5 Colo. 176; *Anderson v. Weiser*, 24 Iowa, 430; *Montross v. Eddy*, 94 Mich. 100; 34 Am. St. Rep. 323; *Ranney v. Donovan*, 78 Mich. 318; *Knauss v. Krueger Brewing Co.*, 142 N. Y. 70; *Manders v. Craft*, 3 Colo. App. 236; *Stewart v. Mather*, 32 Wis. 344-55; *Alexander v. Northwestern etc. University*, 57 Ind. 466-78; *Orton v. Scofield*, 61 Wis. 382; *Pollatschek v. Goodwin*, 40 N. Y. Supp. 682-85; 17 Misc. Rep. 587.)

E. R. Annable, and H. Conner, for Respondent.

The brokers were employed to make a "deal," and they became agents for both parties. "The claim to charge commissions for both parties is so unreasonable, that it cannot be justified by any custom or usage." (*Lynch v. Fallon*, 11 R. I. 311; 23 Am. Rep. 458; *Raisin v. Clark*, 41 Md. 158; 20 Am. Rep. 66; *Farnsworth v. Hemmer*, 1 Allen, 494; 79 Am. Dec. 756; *Walker v. Osgood*, 98 Mass. 348; 98 Am. Dec. 168; *Everhart v. Searle*, 71 Pa. St. 256; *Morrison v. Thompson*, L. R. 9 Q. B. 480; *Carman v. Beach*, 63 N. Y. 97; *Bell v. McConnell*, 37 Ohio St. 396; 41 Am. Rep. 528; *Scribner v. Collar*, 40 Mich. 375; 29 Am. Rep. 541.)

GAROUTTE, J.—This action is brought to recover commissions for an exchange of real estate. Judgment went for plaintiff, and a new trial was granted upon motion of defendant. The appeal is prosecuted by plaintiff from the order granting a new trial.

For a defense to the action it is claimed that plaintiff's assignors, the brokers, received compensation for their services from the other party to the trade without his (defendant's) knowledge, and for that reason he now insists that the brokers are barred from recovering any compensation from him. In other words, it is claimed that the law will not allow the brokers to act as the agent of both parties, and a contract of that kind for compensation will not be recognized by the courts. As a general principle, this contention is sound, but there are circumstances where a party may act for two persons and charge compensation from both for his services. If the duty of the broker is simply to bring together two men who desire to exchange their lands, and the broker's entire duty is performed when he has brought the two men together, then we see nothing against good morals and a sound public policy in allowing compensation to the broker from each of the parties. In such a case, the broker is in no sense representing conflicting interests. He has nothing whatever to do with the trade. Under the contract his advice and assistance to either party is not called for. Upon the state of facts here assumed, the broker may be termed a middleman and not an agent in the strict sense of the term. In

speaking to such a state of facts the court said, in *Manders v. Craft*, 3 Colo. App. 239: "In this case there was technically no purchase or sale; no money passed. It was an exchange of one kind of real estate for another. With the prices, details, and trade the agent had nothing to do, and the arrangement was that he should not have. His sole action and employment terminated with bringing the parties together, which he did. The trade was made by the parties, consequently the agent is not obnoxious to the charge of double employment under the law. There was nothing in the relation of the agent to either to prevent compensation from both if both agreed to pay."

In *Green v. Robertson*, 64 Cal. 76, this court said: "The matters set up in the answer as to the employment of plaintiff by Tucker do not constitute a defense. The plaintiff made no bargain for the sale of the property; he was not authorized to make a bargain; he undertook to bring the buyer and seller together, and he did so; they made their own bargain; and after plaintiff had rendered his services and brought them together, and after they had made their bargain, the defendant executed the instrument in suit."

If the broker here was merely a middleman, as in the cases above cited, the defendant could not defeat plaintiff's cause of action upon the ground that the other party to the exchange of property had paid him a fee for the services rendered. This question was essentially one of fact and one upon which the trial court found in favor of plaintiff. Yet while the evidence was ample to support such a finding, there was some evidence to the contrary—possibly sufficient evidence to justify a finding the other way if one had been made. The new trial appears to have been granted upon the ground of the insufficiency of the evidence to support the findings, and where the evidence is at all conflicting we cannot disturb the order which grants a new trial. For these reasons the order appealed from must be affirmed.

By the broker's contract with the defendant in this case they were employed to make a "deal" for him respecting a certain piece of property. By plaintiff's complaint he alleged that under this contract the brokers procured a purchaser able and willing to purchase the land. Under the contract

and under this allegation of the complaint evidence was introduced showing an exchange of land rather than a purchase. We do not deem such evidence at variance either with the terms of the contract or with the allegations of the complaint. An employment to find a purchaser and an allegation that a purchaser was found is satisfied by evidence that a party was found with whom the contracting party exchanged lands. Especially should that be held in this case, where all the evidence introduced tending to show an exchange of lands was offered and received without objection.

For the foregoing reasons the order appealed from is affirmed.

Harrison, J., and Van Dyke, J., concurred.

[S. F. No. 1002. Department Two.—July 6, 1899.]

DANIEL WILSON, Assignee, etc., Appellant, v. DENNIS F. NUGENT, Respondent.

MECHANICS' LIENS—RETENTION OF MONEY DUE CONTRACTOR—DETERMINATION OF RIGHTS—DEPOSIT IN COURT.—Under the statute providing for the retention of twenty-five per cent of the money to be paid by the owner of a building to a contractor for the construction or repair thereof, in order to pay off and discharge liens filed thereupon, the owner has the right to retain the money to protect the property from valid liens; but he cannot pass upon their validity except at his own peril. He may protect himself by depositing the money in court, to await its determination of the validity of the liens, and of the rights of the contractor, or of his assignee in insolvency.

ID.—VOLUNTARY PAYMENT BY OWNER—CLAIM OF ASSIGNEE IN INSOLVENCY.—Where the owner made a voluntary payment of lien claimants so as to consume the whole of the twenty-five per cent reserved payment, acting upon his own judgment of their validity in so doing, after knowledge of a claim made to the whole of the reserved payment by the assignee in insolvency of the contractor, the owner is not protected by such payment, if the liens are in fact invalid; and, in such case, the assignee in insolvency may recover from him the amount of the claim.

ID.—INVALID NOTICES OF LIEN—TERMS OF CONTRACT NOT TRULY STATED.—Notices of claims of lien by materialman which untruly state the terms and conditions of the contract as being "that claimant was to receive the reasonable market value of the materials so furnished," whereas in fact the materials were furnished in each

case to the contractor at a fixed price, are invalid on account of the variance, and create no lien upon the premises.

ID.—HAULING SLATE FOR ROOF.—Persons who did not furnish materials to be used on the building, nor perform any labor thereon, but who were merely engaged by the contractor to haul slate to the building and deliver it to the contractor for his use upon the roof, are not within the terms of the lien law, and are not entitled to a lien upon the building for such labor.

ID.—USE OF MATERIALS—FINDINGS—SUPPORT OF JUDGMENT.—In order to sustain a judgment in favor of the validity of liens of materialmen, the findings must show that the materials furnished by the lien claimants were furnished to be used, and that they were used in the construction of the building upon which the lien is claimed.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. Edward A. Belcher, Judge.

The facts are stated in the opinion of the court.

Walter H. Linforth, and Johnson, Linforth & Whitaker, for Appellant.

Peri M. Allen, and T. M. Osmont, for Respondent.

THE COURT.—Action to recover eight hundred and thirty-six dollars. Judgment for defendant. Motion for a new trial denied. This appeal is by the plaintiff from the judgment and order. On May 16, 1895, one De Gear entered into a written contract with defendant to roof St. Rose's church for three thousand three hundred and forty-four dollars. The contract was in the usual form and provided that twenty-five per cent, being the final payment, should be retained by defendant for thirty-five days after the completion of the contract. March 7, 1896, the contract was completed, and defendant made all the payments as he had agreed to do, except the twenty-five per cent (eight hundred and thirty-six dollars) which he retained under the terms of the contract for the payment of any claims that might be valid liens against said building.

On March 28, 1896, seven mechanics' liens were filed against said church, aggregating about the amount still in the hands of defendant. On April 11, 1896, said De Gear filed a petition in insolvency; the plaintiff was in due course elected assignee of said insolvent, and on April 24, 1896, an

assignment of all the estate of said De Gear was made to plaintiff. After the said plaintiff had qualified as assignee and prior to June 3, 1896, he notified defendant in writing of his election and qualification as assignee, and of his claim to the eight hundred and thirty-six dollars, and forbade its payment to anyone else other than plaintiff. On June 3, 1896, after defendant had knowledge of all these facts and of the claim of plaintiff to said money, and without any order of court, or any judgment as to the validity of any of said alleged liens, he paid them all, amounting with costs to more than the eight hundred and thirty-six dollars. It was admitted at the trial that unless the defendant was released from liability to plaintiff by reason of the payment of the said alleged liens that the eight hundred and thirty-six dollars was due and unpaid from the defendant to the plaintiff. At the time of the qualification of the plaintiff as assignee the defendant was indebted to plaintiff as such assignee and legal representative of De Gear in said sum of eight hundred and thirty-six dollars, unless there were valid and existing liens against said fund or against the property of defendant, and in order to satisfy which defendant in law had the right to use said fund. Defendant did not owe the alleged lien claimants, as he had made no contract with them. The provisions of the statute authorizing the owner to retain the twenty-five per cent in order to pay off and discharge liens was designed both for the protection of the owner and of laborers, materialmen and holders of valid liens. Subcontractors, laborers, and materialmen may look to the contractor alone, or if they have any doubt as to his solvency, they may avail themselves of the statutory provisions as to filing and recording liens. If such liens are filed, the owner has the right to retain the amount in his hands for his own protection, for the purpose of paying off and discharging such liens as may be valid and to charge the amount so paid to the contractor. The defendant knew, at the time of paying this fund to the alleged lienholders, of the claim of plaintiff. While he had the right to use the fund in accordance with law to protect his property from valid liens, he could not himself pass upon their validity except at his own peril. He could easily have protected him-

self by depositing the money in court and let the court determine the validity of the liens and the rights of plaintiff. (*De Camp Lumber Co. v. Tolhurst*, 99 Cal. 635.) The findings are attacked on the ground of insufficiency of evidence to support them, and it becomes necessary to examine the evidence as to the validity of the liens. The statute requires that the notice of lien shall contain a statement of the terms, time given, and conditions of the contract. (Code Civ. Proc., sec. 1187.) This statement must not only be made, but it must be true.

The notices of liens of Farnsworth & Ruggles, forty-four dollars and eighty-one cents; James Young, thirty-four dollars and seventy cents; Pacific Metal Works, two hundred and seventy-one dollars and ninety cents; Schrader & Lutge, twenty-three dollars and forty-five cents; Thomas Alderson, two hundred and eighty-nine dollars and twenty-seven cents; Dunham, Carrigan & Hayden Company, eighty-four dollars and twenty-seven cents, each stated as a part of the terms, time given, and conditions of the contract that claimant was to receive the reasonable market value of the materials so furnished. The uncontradicted evidence shows that the materials were furnished in each case to De Gear at a fixed price. This was fatal to the liens. The proof showed the notices of lien in each case to be untrue. In *Reed v. Norton*, 90 Cal. 590, decided by this court in Bank, it was held that where the notice of lien stated that the claimant was to be paid for the labor done and furnished at what it was reasonably worth, and the evidence showed that claimant had an express contract, the variance was fatal and claimant could not recover. So in *Wagner v. Hansen*, 103 Cal. 104, the complaint alleged that the work was to be done at an agreed price but the evidence showed no agreed price, and the variance was held to be fatal. It was there said: "The purpose of the record and statement must be to inform the owner, in case of a contractor and laborers rendering service under such contract, as to the extent and nature of a lienor's claim, to facilitate investigation as to its merits. Such a statement as the above would be misleading. The lienor is required to verify the statement. In all essential particulars it must be true." In the

late case of *Santa Monica etc. Co. v. Hege*, 119 Cal. 377, it was held that a different rule applies to a variance between the pleading and proof and a variance between the notice of lien and proof, and in case the proof shows that the contract set forth in the notice of lien is untrue it is fatal to the lien. It is said in the opinion: "The right to enforce a mechanic's lien depends upon a compliance with the requirements of the statute. Unless the notice of the lien which is filed with the county recorder contains the statements required by section 1187 of the Code of Civil Procedure, the claimant is not entitled to his lien. This section requires the claim of a materialman to contain a statement of his demand after deducting all just credits and offsets, and also a statement of the terms, time given, and conditions of his contract. The provision that the claim must contain these statements means that the statements thus contained must be correct and in accordance with the facts. If they are not correctly stated the right to a lien is lost."

Applying the rule as laid down in the foregoing cases, the said liens must fall. The burden was upon defendant to show that the said liens were valid and enforceable liens upon the premises. The proof showed a contract in each case that in law created no lien under the notice given. The proof did not show that Farnsworth & Ruggles had any lien. They did not perform labor upon or furnish material to be used on the building. Their services consisted of hauling slate to the building and delivering it to the contractor. This did not bring them within the terms of the statute. (*Adams v. Burbank*, 103 Cal. 651.)

Another fatal objection to the judgment in this case is that the court nowhere finds that the materials furnished by the said lien claimants were furnished to be used and that they were used in the building and construction of the said church. (*Silvester v. Coe Quartz Mine Co.*, 80 Cal. 510; *John A. Roebling Sons Co. v. Bear Valley Irr. Co.*, 99 Cal. 488.)

It is claimed by defendant that before the filing of his petition in insolvency said De Gear requested him to pay and he did agree to pay the claim of said alleged lienholders. Even if this kind of an unperformed agreement constitutes a defense, we do not think the evidence supports the contention; De Gear says that he told defendant that there were certain claims against the building that he was unable to

meet, and that he desired that they should be paid. Defendant testified that he paid them because he supposed they were correct to avoid a lawsuit and because he considered them just. That De Gear told him all these liens had to be paid; that the reason he did not pay them at once is because he was afraid he would have to pay them twice. That by general information he satisfied himself that the liens were valid and then paid them.

We think this evidence shows that defendant acted upon his own judgment in paying the claims, and that he believed they were valid liens against the building. He had no right, however, to set up his opinion as to the legality of the liens, after knowing that plaintiff claimed the right to contest them, without taking the chances on the correctness of that opinion. Plaintiff clearly had the right to claim that the liens were invalid, and, if their validity should be established, to claim the fund as the representative of the general creditors of De Gear.

The judgment and order are reversed.

Hearing in Bank denied.

[S. F. No. 1387. Department Two.—July 6, 1899.]

In the Matter of the Estate of HIRAM A. PEARSONS, Deceased. ST. FRANCIS TECHNICAL SCHOOL, and ELIZABETH MALONE, Superioress, Appellants. SAN FRANCISCO LADIES' PROTECTION AND RELIEF SOCIETY et al., Respondents.

BEQUEST TO ORPHAN ASYLUM—TECHNICAL SCHOOL FOR ORPHANS.—

A bequest of money "to be equally distributed among the orphan asylums of the city and county of San Francisco," does not include a "technical school" situated therein, the primary and main purpose of which is to give to orphan girls who are fourteen years old or more such special training as will fit them for certain vocations in life, and in which the work of the girls contributes to their support.

ID.—NATURE OF ORPHAN ASYLUM.—The primary idea of an orphan asylum is that it is a place of safety, refuge, retreat, or sanctu-

ary for indigent and dependant orphans who have no homes elsewhere, and to afford them a home with protection, support, et cetera, during the period of their dependency.

APPEAL from a decree of the Superior Court of the City and County of San Francisco settling the final account of an executor and distributing the estate of a deceased person. J. V. Coffey, Judge.

The facts are stated in the opinion of the court.

Garret W. McEnerney, for Appellants.

Joseph Hutchinson, for San Francisco Ladies' Protection and Relief Society; George W. Haight, for San Francisco Protestant Orphan Asylum; A. N. Drown, for Maria Kip Church Orphanage; Joseph Naphtaly, for Pacific Hebrew Orphans' Asylum and Home Society, and Sullivan & Sullivan, for Roman Catholic Orphan Asylum and St. Joseph's Roman Catholic Infant Asylum, Respondents.

McFARLAND, J.—This is an appeal by the St. Francis Technical School and Elizabeth Malone, superioress thereof, from a decree of final distribution, and also from a decree settling the final account of the executor.

The deceased, Pearsons, left a will, in which he provided, among other things, that certain specific property should be sold and "the proceeds of such sale be equally distributed among the orphan asylums of the city and county of San Francisco. And the said asylums I request to be designated by the judge of the probate court." There were a large number of applicants for distributive shares of this fund, each claiming to be an orphan asylum within the meaning of the said clause in the will. On December 20, 1894, the court made a decree by which the claims of some of the applicants were allowed and those of others denied. An appeal was taken from that decree to this court and the decree was reversed; and the opinion of this court on that appeal quite fully sets forth the principles upon which the court below should be governed upon another hearing of the case. (See *In re Pearsons*, 113 Cal. 577.) After the going down of the *remittitur* the matter was heard again by the superior court,

and a decree was rendered in which six of the applicants were declared to be within the terms of the will and entitled to a distributive share of the fund. The applications of all the others were rejected, and among them was that of the St. Francis Technical School which now appeals from the decree. The appellant concedes that the six applicants were properly held to be orphan asylums and to be entitled to shares of the fund. But it claims that the court erred in holding that it was not an orphan asylum within the meaning of the will and not entitled to any share of the fund.

The court below was right in deciding against the claim of the appellant. It was not an orphan asylum within the principles declared at the former appeal. On that appeal it was held that "the prominent idea of an asylum is that it is a place of safety, a place of refuge, a retreat, a sanctuary," for indigent and dependent orphans who have no home elsewhere, and to afford them a home, with protection, support, et cetera, during the period of their dependency. The appellant here is not within this definition. Its primary and main purpose is to take such girls as chose to go to it, and who are fourteen years old or more—when their period of dependency is mostly over—and to give them such special training as will fit them for certain vocations in life. The work of the girls contributes to their support. The primary and principle purpose of the appellant is not that of an asylum as above described, but of a school. It is in fact what its name (although the name would not be controlling) indicates—a "technical school." Hospitals, reformatories, directories, and schools, although dealing with orphans, are clearly distinguishable from orphan asylums. Similar reasons which induced the court on the former appeal to reject the claims of the Boys' and Girls' Aid Society and the Girls' Directory Orphan Asylum to be beneficiaries under the will, lead necessarily to the rejection of the claim of appellant.

The case of *Wilson v. Squire*, 1 Younge & C. Ch. 654—the only authority cited by appellant—is not in point. The bequest in that case was to the governors and trustees of "The London Orphan Society on the City Road"; it was not to a class; there was only one beneficiary named, and the task of the court was merely to determine who that single beneficiary

was. Moreover, the word "asylum" did not appear in the will; the words used were "Orphan Society"; and, of course, there could be many kinds of societies connected in various ways with orphans which would not be asylums.

The judgment and decrees appealed from are affirmed.

Temple, J., and Henshaw, J., concurred.

Hearing in Bank denied.

Beatty, C. J., dissented from the order denying a hearing in Bank.

[Sac. No. 472. Department One.—July 1, 1899.]

JOHANNA GLUECK et al., Respondents, v. ADOLPH P. SCHELD, Appellant.

ACTION FOR DEATH—NEGLIGENCE—DISCHARGE OF PISTOL CARELESSLY HANDLED.—One engaged in manipulating a loaded pistol in presence of others should use great care in the manipulation; and in an action for a death caused by the discharge of a pistol carelessly handled, the negligence of the defendant is sufficiently shown by evidence that the loaded pistol was pointed by him in the general direction of the deceased, with knowledge thereof, and was being manipulated in a manner likely to cause it to be fired.

ID.—CONTRIBUTORY NEGLIGENCE—POSITION OF DECEASED.—The position of the deceased, about forty feet off at an angle from a target, at which defendant and others had been firing, and about one hundred and fifty feet from the defendant, when the loaded pistol of the defendant, without being fired at the target, was negligently discharged, thereby causing his death, did not constitute contributory negligence *per se*; and the jury were justified in finding that his position when killed was not in itself a dangerous one, and that he was not guilty of contributory negligence in being at that point, at that time.

APPEAL from a judgment of the Superior Court of Sacramento County and from an order denying a new trial. J. E. Prewett, Judge.

The facts are stated in the opinion of the court.

A. L. Hart and Albert M. Johnson, for Appellant.

The injury was the result of an extraordinary and unanticipated accident, which neither party knew or had reason to believe would produce the result; and the defendant is not responsible therefor. (Beach on Contributory Negligence, secs. 36, 37 et seq; *Niosi v. Empire Steam Laundry*, 117 Cal. 257; *Blyth v. Birmingham, etc. Co.*, 11 Ex. 781; *Crafter v. Metropolitan Ry. Co.*, L. R. 1 Com. P. 300; *Metropolitan Ry. Co. v. Jackson*, L. R. 3 App. Cas. 193; *Sharp v. Powell*, L. R. 7 Com. P. 253; *Stanly v. Powell* (1891), 1 Q. B. 86; *Harvey v. Dunlop*, Hill & D. 193; *Brown v. Kendall*, 6 Cush. 292; *Morris v. Platt*, 32 Conn. 75; *Parrott v. Wells*, 15 Wall. 524.) One who knowingly puts himself in a dangerous position cannot recover for a resulting injury. (Pollock on Torts, Webb's Am. ed., 191; *Schoenfeld v. Milwaukee City Ry. Co.*, 74 Wis. 433; *L. S. & M. S. R. R. Co. v. Clemens*, 5 Bradw. (Ill. App.) 77; *Illinois Cent. R. R. Co. v. Hetherington*, 83 Ill. 510.)

Isaac Joseph, T. J. Crowley, and F. C. Castelhun, for Respondents.

The questions of negligence and contributory negligence were passed upon by the jury, upon conflicting evidence and reasonable inferences of fact, and their verdict is conclusive. (*Buchel v. Gray*, 115 Cal. 421; *Carraher v. San Francisco Bridge Co.*, 100 Cal. 177; *Boyd v. Addous*, 97 Cal. 510.) An unanticipated accident will not free from responsibility one who heedlessly handles firearms. (*Talley v. Ayres*, 3 Sneed, 677; *Chataigne v. Bergeron*, 10 La. Ann. 699; *Chiles v. Drake*, 2 Met. (Ky.) 146, 154; 74 Am. Dec. 406; *Wright v. Clark*, 50 Vt. 130, 135; 28 Am. Rep. 496.) If a person is injured by the discharge of a gun in the hands of another who has entire control of it, the burden is cast upon the latter to prove that the gun was not fired at the party injured either intentionally or negligently, but the result was inevitable and without the least fault upon the part of the one handling the gun. (*Atchison v. Dullam*, 16 Brad. (Ill. App.) 42; *Moebus v. Becker*, 46 N. J. L. 41; *Morgan v. Cox*, 22 Mo. 372; 66 Am. Dec. 623; *Bullock v. Babcock*, 3 Wend. 391; *Dixon v. Bell*, 5 Maule & S. 391; *Dalton v. Favour*, 3 N. H. 465; *Whitby v. Brock*, 4 Times L. R. 241.)

GAROUTTE, J.—The widow and children of Frederick Glueck, deceased, have brought this action to recover damages for his death, which occurred under the following state of facts:

Defendant and a friend were firing at a target with pistols at a distance of about one hundred and thirty-five feet, and near the home of Glueck. He was standing at an angle from the target and defendant some forty feet distant from the target, and one hundred and fifty feet distant from defendant, observing the firing. Defendant's pistol became disarranged, and while holding it upon his knee and in the act of repairing the defect it was fired, and the ball struck and killed Glueck. The pistol was pointed in the general direction of Glueck at this time. The evidence is sufficient to indicate that fact, especially so when the sad results of the shot are considered. Upon this state of facts were the jury justified in holding defendant pecuniarily liable? The true solution of this question is dependent upon the propositions, viz: Was the defendant guilty of such contributory negligence as would release defendant from liability? Appellant's counsel contend with but little zeal that defendant was not guilty of negligence. A party who is engaged in manipulating a loaded pistol should use great care in such manipulation; and the fact that this pistol was pointed in the general direction of the deceased, with knowledge of defendant that it was loaded, and with the further knowledge by him of the location of the deceased at that time, and in view of the further fact that it was being manipulated in a manner which was likely to cause it to be fired, are matters which taken together are amply sufficient to stamp the conduct of the defendant as negligent to a great degree. In the statement of the foregoing facts we give them in line with the verdict of the jury. Under the evidence, the jury were justified in finding these facts as we have summarized them, and upon such a finding they were authorized in saying that defendant did not exercise that care in handling his pistol which the law demands.

Was the deceased guilty of contributory negligence? Much is said by defendant's counsel regarding the dangerous position occupied by deceased when shot, to the effect that he was but forty feet from the target and had been warned that his

position was a dangerous one and advised to change it. If deceased had been killed when defendant was firing at the target, by reason of a spent ball, or a poor aim or a premature discharge of the pistol, these claims would have weight. But we do not see that they have anything to do with the case under existing circumstances. It would seem that the firing at the target is almost a false quantity. The deceased was not killed by reason of his proximity to the target; and thus his position of danger, if it was a dangerous one, did not contribute to the accident. Perchance before the firing at the target had been resumed he would have changed his position. In its simplest form the case seems to be that deceased was standing about one hundred and fifty feet distant from defendant, who was manipulating a loaded pistol. At this time the pistol was accidentally discharged by reason of this manipulation, and deceased was killed by the shot. Under these circumstances, the jury were entirely justified in finding deceased was not guilty of negligence by reason of being at the point where killed. In other words, the jury had the right to say, from the evidence, that his position at the moment of time when he was killed was not in itself a dangerous one.

The law of the case was properly presented to the jury.

For the foregoing reasons the judgment and order are affirmed.

Van Dyke, J., and Harrison, J., concurred.

[S. F. No. 986. Department One. July 1, 1899.]

JAMES D. BROWN, Assignee, etc., Appellant, v. ANGUS McKAY, Respondent.

TENANCY IN COMMON—ADVERSE POSSESSION—HOSTILE—INTENT.—In order to establish adverse possession by a tenant in common against his cotenants, clear and unequivocal proof is required of hostile intent on his part manifested to oust the cotenants.

ID.—PRESUMPTIONS—FATHER AND SON AS COTENANTS.—All presumptions of law, of fact, and of good morals are against an adverse holding by a father who became tenant in common with his sons as heirs of the deceased wife and mother, and who recognized their title by becoming guardian of their estate and maintained

friendly relations with them until death, and devised his interest to them in one parcel of the inherited realty.

Id.—UNSETTLED GUARDIANSHIP—LEASE—INSUFFICIENT PROOF OF ADVERSE HOLDING.—The mere facts, in such case, that the guardianship was never settled, and that the father executed a lease to one of the sons after he became of age, of another parcel of the inherited realty, which does not appear to have been devised by the father, are insufficient to evince a hostile intent as to such parcel, or to establish an adverse holding thereof by the father as against the sons.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. J. M. Seawell, Judge.

The facts are stated in the opinion of the court.

Bartholomew Noyes, and G. R. Lukens, for Appellant.

David McKay, Sr., recognized the title of his sons, and the presumption is of a continuing friendly possession for them as tenant in common with them until clear proof of ouster brought home to their knowledge, which is not shown to have existed. (*McCracken v. San Francisco*, 16 Cal. 635; *Miller v. Myles*, 46 Cal. 535; *Northrop v. Wright*, 24 Wend. 221; *Coleman v. Clements*, 23 Cal. 245; *Culberhouse v. Shirey*, 42 Ark. 25, 28; *Bannon v. Brandon*, 34 Pa. St. 263; 75 Am. Dec. 655; *Hart v. Gregg*, 10 Watts, 185; 36 Am. Dec. 166; *Zeller v. Eckert*, 4 How. 289; *Hulvey v. Hulvey*, 92 Va. 182.)

W. S. Goodfellow, and W. B. Bosley, for Respondent.

David McKay had adverse possession after the minors became of age, under his exclusive control thereafter. Membership of the same family is immaterial, where there is exclusive control. (*Feliz v. Feliz*, 105 Cal. 1.)

GAROUTTE, J.—This is an action of ejectment brought by the assignee in insolvency against the defendant Angus McKay, who was also the insolvent debtor. The facts are these:

Mrs. Mary A. McKay, wife of David McKay, died in 1859, leaving two sons—this defendant Angus McKay, and David McKay, Jr., this defendant then being of the age of five years,

and David being still younger. At the time of her death she was the owner of a piece of property in the city of San Francisco, described in this record as the "Dupont street property," and she also possessed a community interest in the piece of property here designated as the "Davis street property." As heirs-at-law of their mother an undivided one-third of the Dupont street property passed to each of the sons, and likewise an undivided one-fourth of the Davis street property. In 1883, defendant Angus McKay was adjudged an insolvent debtor, and his estate was administered upon; the debtor was discharged from his debts and thereafter the then assignee died. No part of the real estate here mentioned was included in the assets of the insolvent's estate. In 1894 David McKay, the father, died, leaving a will. Upon his death it first came to the knowledge of the sons that, as heirs of their mother, they became the owners of the aforesaid interests in the two described tracts of land. Pending the administration upon the father's estate, Angus McKay took out letters of administration upon his mother's estate, and this property under such administration was finally distributed to the sons in the proportions aforesaid. Thereafter this plaintiff was appointed assignee in the insolvency proceedings to succeed his dead predecessor, and now seeks by ejectment to recover the possession of defendant's interest in the land inherited by him from his mother.

The only defense made to this action is the plea of the statute of limitations, defendant now claiming that his father, prior to his death, obtained title to the property here involved, by adverse possession. The trial court declared the facts in accordance with this claim and rendered judgment for defendant. This appeal is taken from that judgment and also from the order denying a motion for a new trial.

Upon a careful examination of the record, the court has arrived at the conclusion that the facts to support the claim of adverse possession in the father are too meager to accomplish that result. The case, in its facts upon the question of adverse possession, is a peculiar one, viewed from various standpoints. It is peculiar in this: Defendant Angus McKay, during the period dating from his mother's death, 1859, to his father's

death, 1894, the period in which the adverse possession must have been created, never knew that he owned an interest in this real estate. Again, in this litigation he is relying upon an adverse possession against himself, created by his father. In other words, he is relying upon title in himself as the heir of his father, whom he claims secured title to this property by adverse possession against him; and he makes such claim in face of the fact that he administered upon his mother's estate after his father's death, claiming throughout those proceedings that the property here involved was her property and passed to him by reason of his heirship. But, however interesting these circumstances may be, they are not determinative of the case, and we pass to the facts upon which the claim of adverse possession in the father is based.

Eo Instanti upon the mother's death, in 1859, the father and the sons became tenants in common of these two parcels of land. As has been stated, the defendant was then about five years of age, and his brother younger. In 1861 the father, David McKay, filed a petition in the probate court setting forth that his two sons held undivided interests in these two parcels of land as heirs of their mother, and asked to be appointed guardian of their estates. The court made the order of appointment, and the record of the proceeding here ends. The defendant became of age in 1875, and prior to that time there is not a particle of evidence tending to show any adverse claim to this property made by the father against his minor sons. He simply cared for the property, and that was all. He paid the taxes. He collected the rents. He insured the property and made the repairs. No one of these acts in any way or degree is inconsistent with his position as a tenant in common, especially in view of the fact that his minor sons were his cotenants. As substantially settling the question in favor of the title of the minors during their minority, the father's declaration in his petition for letters of guardianship may be cited.

After the arrival of the defendant at years of majority, we find but a single additional circumstance tending in any way to support the theory of the defendant that the father's intentions, toward his title were hostile. And this is but a trifle. During the years from 1877 to 1883 the father leased to the

defendant the Davis street property, at the monthly rental of one hundred dollars per month. This circumstance, conceding it as material as to the Davis street property, is wholly immaterial as to the Dupont street property. Upon the other hand, taking all the facts of the case together, it is incredible that the father of these two boys, before or after their arrival at the age of majority, ever intended to gain title to this property from them by adverse possession. Hostile intent of the party in possession as a cotenant is all-important in such a case, and we feel safe in saying there is no hostile intent manifested here. Certainly, no hostile intent was brought home to the sons. We have the express declaration of the father in 1861 that he had no such intent; and his conduct thereafter is entirely consistent with such declaration. During this whole period, extending up to the very day of his death, the relations of David McKay, senior, with his boys were of the most friendly character. This is shown by the fact that the defendant acted as his agent during his absence, in the collection of rents; that the son David was appointed executor of his last will and testament; that the father advised and counseled with the defendant during his pecuniary embarrassments, and assisted him in the preparation of his petition in insolvency; that under his will, as evidenced by the decree of distribution, he devised in equal shares to his two sons his undivided one-third interest in the Dupont street property. These things show the friendly relations existing between the father and the sons, and the utter improbability that any intent ever existed in the mind of the father at any moment of time to supplant the title of his sons in these lands by a title of his own under a claim of adverse possession. As an additional consideration looking to this conclusion, it may be said that the father was half a millionaire, as shown by the inventory and appraisement of his estate, while the interest of the defendant in these two lots is appraised at the sum of four thousand dollars.

There is a further consideration which strongly impresses the court with the conclusion that McKay, Sr., never claimed title to the interest of his son in this property. By the inventory and appraisement filed in his estate his interest in the Dupont street lot is described as an undivided one-third

thereof; and by the decree of distribution an undivided one-third of said Dupont street lot is distributed to the two sons in equal shares. For some reason not understood by the court the will of David McKay, Sr., is not in the record, but in view of the inventory and appraisement and the decree of distribution it is evident that David McKay, by his will, did not attempt to dispose of the entire Dupont street property, but only attempted to dispose of an undivided one-third interest therein. Such disposition of his property by his will is wholly inconsistent with a claim of title in him to the entire tract, and it is almost conclusive evidence that he never at any time made such claim. This being the status of the Dupont street lot, we safely assume if he made no claim of title in himself to that property he likewise made no claim to the Davis street property.

All presumptions of law, of fact, and of good morals are against an adverse holding in a case possessing the features of this case; and to overcome those presumptions there must be a showing by the record of clear, direct and unequivocal acts upon the part of the adverse holder, indicating an intention to claim the property as his own. Such a case is not made out by this record. It may be further suggested that the case disclosed by the record is not one of conflicting evidence.

For the foregoing reasons the judgment and order are reversed and the cause remanded for a new trial.

Van Dyke, J., and Harrison, J., concurred.

Hearing in Bank denied.

[S. F. No. 1030. Department Two.—July 3, 1899.]

ARCHIBALD COOPER, Respondent, v. CHARLES W. GORDON, Appellant.

ACTION—UNFILED STIPULATION FOR JUDGMENT—CONSENT TO DELAY—

ESTOPPEL TO URGE DISMISSAL.—An unfiled stipulation that the plaintiff in an action may enter judgment against the defendant for a stipulated sum at any time, and that execution should be stayed while specified payments were made, is in lieu of an answer admitting the allegations of the complaint, and is a consent to the jurisdiction of the court, and to the entry of the appearance

of the defendant, and of judgment after the time limited by statute, and estops the defendant from insisting upon a dismissal of the action, on the ground that plaintiff has not served the summons within three years, or prosecuted the action with diligence.

ID.—TIME FOR APPEARANCE—WAIVER OF STATUTE—CONSTRUCTION OF CODE.—A defendant may waive the provisions of section 406 and of subdivision 7 of section 581 of the Code of Civil Procedure, in regard to the time for his appearance, which are intended to relieve defendants from the assertion of stale demands and not to preclude a subsequent appearance without objection, or by consent of parties.

ID.—USE OF STIPULATION.—Though stipulations do not bind the parties until filed, yet, when filed, they do bind the parties, and may then be used to show that a party has violated his stipulation, and as a basis of relief to the person who has been injured by trusting to it.

ID.—DISMISSAL FOR WANT OF PROSECUTION—VACATION OF JUDGMENT BY ASSIGNEE—PROOF OF STIPULATION.—An action is properly dismissed for want of prosecution where no service of summons appears, and nothing has been done in the action for nearly thirteen years; but the judgment of dismissal is properly vacated upon motion of an assignee of the cause of action, upon showing that on the day after the commencement of the action the plaintiff and defendant had stipulated that judgment might be entered at any time, that the defendant had stipulated likewise with a former assignee of the cause of action two years thereafter, and also with the moving party as a subsequent assignee, ten years after the suit was brought, the last stipulation specifying a less rate of interest.

ID.—PROOF TO WARRANT JUDGMENT.—Where the genuineness of the signatures to the stipulations was admitted merely for the purpose of the motion to vacate the judgment of dismissal, the court should require proof of such genuineness, and of the amount for which the plaintiff is entitled to judgment, before entering the judgment under the stipulations.

APPEAL from an order of the Superior Court of the City and County of San Francisco vacating a judgment of dismissal of action. William R. Daingerfield, Judge.

The facts are stated in the opinion of the court.

Thomas W. Nowlin, and Myrick & Deering, for Appellant.

The action was properly dismissed for want of prosecution. (Code Civ. Proc., sec. 581; *Pardy v. Montgomery*, 77 Ca. 326; *Kulbi v. Hawke*, 89 Cal. 638; *Grigsby v. Napa County*, 36 Cal. 585.) Stipulations not filed cannot be noticed

and do not bind the parties. (*Borkheim v. North British etc. Ins. Co.*, 38 Cal. 623; *Merritt v. Wilcox*, 52 Cal. 241.) the motion to dismiss was not a general appearance of the defendant. (*Linden etc. Co. v. Sheplar*, 53 Cal. 245; *Powers v. Braly*, 75 Cal. 237.) Jurisdiction of the person cannot be shown by unproved stipulations or admissions. (Code Civ. Proc., secs. 415, 1132, 1133; *Reinhart v. Lugo*, 86 Cal. 395; 21 Am. St. Rep. 52; *Lyons v. Cunningham*, 66 Cal. 42; *Alderson v. Bell*, 9 Cal. 315; *Sharp v. Brunnings*, 35 Cal. 528; *Litchfield v. Burwell*, 5 How. Pr. 346.)

A. H. Carpenter, for the Respondent.

The court was imposed upon as to the real state of the case and the judgment was properly vacated. (*Walker v. Felt*, 54 Cal. 388; *Amador etc. Co. v. Mitchell*, 59 Cal. 169; *Dunlap v. Steere*, 92 Cal. 345; 27 Am. St. Rep. 143.) The defendant's stipulations took the place of an answer. (*Alta Silver Min. Co. v. Alta Placer Min. Co.*, 78 Cal. 629; *Ward v. Clay*, 82 Cal. 508; *Richardson v. Musser*, 54 Cal. 196.) Jurisdiction of the person may be obtained by agreement or consent of the party. (12 Am. & Eng. Ency. of Law, 299; *Meredith v. Santa Clara Min. Assn.*, 60 Cal. 619; *Luco v. Superior Court*, 71 Cal. 555; *Gray v. Hawes*, 8 Cal. 562; *Davis v. Packard*, 6 Wend. 333; *Foote v. Richmond*, 42 Cal. 443.) The vacation of the judgment of dismissal was within the discretion of the court. (*Seymour v. Wood*, 53 Cal. 303; *Cameron v. Carroll*, 67 Cal. 500; *Bell v. Peck*, 104 Cal. 35.)

TEMPLE, J.—This action was commenced on the fifth day of April, 1883, and summons was issued on the same day. The summons, so far as appears, was never served on any of the defendants, and no return thereof was ever made or filed. The suit was to foreclose a chattel mortgage on a printing press and other contents of a printing office, given to secure an indebtedness for defendant Gordon, according to the terms of a promissory note which is set out in the complaint. As to the other defendants, the complaint merely avers that they have, or claim to have, some interest in the property. So far as the records of the court disclosed, nothing further was done in the case until the eighteenth day of March, 1896, when, on motion of Thomas W. Nowlin,

attorney, who appeared specially for the purpose, the suit was dismissed, "pursuant to subdivision 7 of section 581 of the Code of Civil Procedure." As nearly thirteen years had elapsed since the taking out of summons, and nothing further appeared to have been done in the case, the order was eminently proper.

On the first day of May, 1896, one J. H. Harper, in the name of plaintiff and as his assignee, moved to vacate the order and judgment of dismissal on the ground that it was obtained by fraud and deceit and through mistake, inadvertence, and excusable neglect on the part of plaintiff. On the hearing it was shown that on April 6, 1883, one day after suit was commenced, plaintiff and defendant entered into a written stipulation to the effect that plaintiff could enter judgment at any time in the action for a stipulated amount, but was to grant a stay of execution upon certain payments being made by Gordon.

Also that on the twenty-sixth day of March, 1885, Gordon again, in writing, stipulated with one George M. Wood, to whom the claim of plaintiff had been assigned, that he, Wood, could have judgment entered at any time for a sum stated. A stay of execution was also stipulated.

On the thirteenth day of September, 1893, another stipulation was made in writing by Gordon and J. H. Harper, which recites that Harper had become the assignee of plaintiff, and stipulates that Harper may take judgment in the action at any time. The amount due is also stipulated, and also certain payments to be made, and a rate of interest less than that called for in the note.

Defendant Gordon appeared in response to the motion and read his own affidavit, which, however, contains nothing of consequence.

The motion was granted and the judgment was vacated on the ground that the stipulations referred to constitute an appearance in the action. The learned judge stated in an opinion included in the order vacating the judgment: "Section 531 of the Code of Civil Procedure does not require an appearance to be filed within three years; it merely requires an appearance to be 'made' within three years." He considered the stipulation that plaintiff could take judgment

equivalent to notice of appearance and said that notice differs from an answer or a demurrer because a pleading did not become such until filed, while the statute provided that the appearance is complete when plaintiff is notified, although the notice is not filed. And yet, if judgment is entered, the judgment-roll must show that summons was served or that defendant has appeared. If appearance was only by notice to plaintiff, as provided in section 1014 of the Code of Civil Procedure, proof of that fact must be found in the judgment-roll.

Appearance provided in section 1014 is primarily for the purpose of entitling the defendant to notice of subsequent proceedings where notice must be given, and for that purpose written notice served on plaintiff is sufficient; but the appearance of defendant is not thereby made in court.

The code is not altogether clear upon this subject. Section 406 provides that, "at any time within the year after complaint is filed, the defendant may in writing, or by appearing and answering, waive the issuing of summons." Apparently this is a declaration that the issuance and service of the summons can be waived in no other mode, and in section 416 it is enacted that the voluntary appearance of a defendant is equivalent to the service of summons.

But in section 581 it is provided, apparently, that such appearance may be at any time within three years. But suppose a defendant were to appear and answer four years after the complaint was filed, and were then to demand a trial objecting to a dismissal although no summons had been issued and no previous appearance made? Could the court then properly dismiss the action against the protest of all parties? I think not. Section 581 is absolute in its terms explicit and comprehensive, but such result could not have been contemplated. It was to relieve defendants from the assertion of stale demands. Mostly, no doubt, it was aimed against those who asserted title to real estate merely to be bought off, and who were in the habit of commencing suits solely to prevent the statute of limitations from running. But even in such a case, where the defendant comes in and files an answer and demands a trial before the suit has been dismissed, I do not understand that the court must neverthe-

less dismiss the action without a trial. On the other hand, I think it would be error to do so. Nor is this absolutely inconsistent with the terms of the statute, which seems to give three years in which the court cannot dismiss though no appearance has been made; after that, and until voluntary appearance has been made, the action may be dismissed as provided.

But if the parties consent that it is a case pending of which the court has jurisdiction, there is no excuse for not trying it.

The stipulation is, in effect, an answer admitting all the allegations of the complaint, with the statement that defendant has no defense. Had it been in words so stated, and the document had been filed, there could have been no question. A stipulation that defendant may take judgment is intended to be in lieu of such an answer.

But the stipulation was not filed within the three years, nor at any time before the case was actually dismissed. It was not filed until motion was made to set aside the judgment of dismissal on the ground that the stipulations themselves excused the neglect of the plaintiff to file them. If such neglect can be excused, they certainly do. Each stipulation leaves it to the plaintiff to apply for judgment whenever he might choose to do so, and each was given in consideration of favors granted defendant. He procured further time to pay his debt, with a reduction of the rate of interest and the use of the printing outfit in the meantime. In the last stipulation signed September 13, 1893, more than ten years after the suit was commenced, it is recited that "by consent of each and all of the above-named persons, judgment has not been rendered therein, but said action is still pending, in which the said Harper as the assignee of said plaintiff, may and can, by reason of the stipulations heretofore made by said defendant, take judgment of foreclosure against said Gordon and sell said property at any time.

Defendant is certainly estopped by this stipulation from urging the objection that the plaintiff has neglected to prosecute the action with due diligence. And it is also a consent to the entry of the appearance of the defendant and the entry of judgment after the lapse of the three years limited by law. Without such consent it could not be done, but, as already

said, where defendant expressly consents to the delay I see no objection to it. It was not intended to limit the right of the parties so to stipulate. Parties may expressly waive most of the provisions designed for their benefit, and I see no reason why this should constitute an exception.

But it is said that stipulations that are not filed do not bind the parties. That is true, but when filed they do bind the parties and may then be used to show that a party has violated his stipulation, and as the basis of relief to the person who has been injured by trusting to it. (*Smith v. Whittier*, 95 Cal. 279.)

The genuineness of the signatures to the stipulations are not denied and are admitted for the purpose of the motion. We must presume that before entering judgment the court will require proper proof to be made both upon that matter and as to the amount for which plaintiff is entitled to judgment.

The order is affirmed.

Henshaw, J., and McFarland, J., concurred.

Hearing in Bank denied.

[S. F. No. 1471. Department One.—July 5, 1899.]

In the Matter of the Estate of JOHN RATHGEB, Deceased,
JULES J. AGOSTINI et al., Respondents, v. ALBERT
GUTTINGER, Appellant.

ESTATES OF DECEASED PERSONS—OMISSION OF PROPERTY FROM INVENTORY—WRONGFUL CLAIM OF EXECUTOR—REVOCATION OF LETTERS.—

The failure of an executor to inventory property belonging to the estate which, without right, he claims as his own, is such misconduct of the executor as justifies the revocation of his letters testamentary; and the court has jurisdiction for the purposes of the revocation to inquire and determine whether the omitted property belongs to the estate, and whether the executor has, without sufficient reason, asserted ownership thereof in himself.

1D.—ORDER FOR PERSONAL PROPERTY—PRESUMPTION OF BAILMENT—STATUTE OF LIMITATIONS.—An order given by the decedent upon his tenant for the delivery of the possession of personal property, does not establish a gift, and the person who receives such property pursuant to the order must be presumed to have held it as bailee of the decedent; and the statute of limitations would not

run in his favor, in the absence of proof of an adverse claim brought to the knowledge of the decedent.

ID.—ADJUDICATION UPON REVOCATION OF LETTERS—ESTOPPEL OF EXECUTOR—ACTION TO RECOVER PROPERTY.—The court, though having jurisdiction for the purpose of the revocation of letters testamentary, to inquire as to the rightfulness of the claim of the executor to property omitted from the inventory, is not competent in such a summary proceeding to decide finally upon the question of title; and the executor is not estopped by the adjudication in such proceeding from showing title in himself in an action to recover the property for the estate.

ID.—PROCEDURE FOR REVOCATION—STATEMENT OF CHARGES.—The statement of the charges of misconduct of the executor, in the petition upon which the court issues an order to the executor to show cause why his letters should not be revoked, is sufficient, without being reiterated in a separate document filed at the hearing.

APPEAL from an order of the Superior Court of Alameda County revoking letters testamentary. F. B. Ogden, Judge.

The facts are stated in the opinion.

Otto Tum Suden, and F. J. Solinsky, for Appellant.

The fact that an executor claims adversely to the estate is not ground for refusing or revoking his letters testamentary. (*Estate of Bauquier*, 88 Cal. 302.) The court had no jurisdiction to settle the title to the property. (*Estate of Haas*, 97 Cal. 234.)

A. Caminetti, and George E. De Golia, for Respondents.

The court had jurisdiction and discretionary power to revoke the letters testamentary, when convinced of a breach of duty on the part of the executor. (Code Civ. Proc., secs. 1436, 1437, 1626; *Deck v. Gherke*, 6 Cal. 669; *In re Moore*, 83 Cal. 587; *Mesmer v. Jenkins*, 61 Cal. 153.)

BRITT, C.—John Rathgeb, a resident of the county of Alameda, died July 26, 1897, leaving a will whereby he appointed Jules J. Agostini, Frank Bernasconi, and Albert Guttinger his executors. The will was duly admitted to probate on August 30, 1897, and letters testamentary were issued to said persons named as executors. On December 7th next following, said Agostini and Bernasconi filed with the court their verified petition charging that Guttinger has concealed moneys, goods, and chattels belonging to the estate of said

testator, and has failed to account to the estate for property, both real and personal, in his possession which belongs to said estate, and that he omitted to include in the inventory and appraisal of the estate previously filed certain real and personal property of the testator situated in the county of Calaveras, and that he has possession of such property and refuses to deliver it to the executors. They prayed that Guttinger be cited before the court to be examined on oath as to the matters charged, and for such order as the court should deem proper. The court made an order reciting the substance of said petition and directing that Guttinger appear on December 27, 1897, to be examined touching the said charges. It made a further order containing like recitals as the other, and reciting in addition that it appeared from credible information that Guttinger has committed or is about to commit a fraud on the estate, and has long neglected his duty as an executor, and directed that his powers as such be suspended until further investigation by the court; also that he show cause at the time and place appointed for his examination as above stated why the said letters testamentary issued to him should not be revoked. Service of copies of said orders and of said petition having been duly made on Guttinger, and he having been cited as required by the court, he filed answers denying the charges of his coexecutors, averring that all the property of which he is possessed is his own and that he is not bound to include it in any inventory of said estate and denying that he had omitted any duty he owed to the estate or that he had committed any fraud thereon, or that he is about to commit such. At the hearing Guttinger was examined and other evidence was introduced; the court found the charges against Guttinger to be sustained, and ordered that his said letters be revoked; also that the other executors institute appropriate actions against him to recover the property of the estate in his possession. From the order revoking his letters he has appealed.

The statutory provisions under which the said proceedings were taken are in substance, so far as necessary to be stated, as follows: Whenever the judge of the superior court has reason to believe, from his own knowledge, or from credible information, that any executor has wasted or embezzled the

property of the estate, or is about to do so, or has committed or is about to commit a fraud upon the estate, or has wrongfully neglected the estate, he must suspend the powers of such executor until the matter is investigated. (Code Civ. Proc., sec. 1436.) Notice of such suspension must be given to the executor, and he must be cited to show cause why his letters should not be revoked. If he fail to appear in obedience to the citation, or, if appearing, the court is satisfied that there exists cause for his removal, his letters must be revoked. (Code Civ. Proc., sec. 1437.) "At the hearing, any person interested in the estate may appear and file his allegations in writing, showing that the executor . . . should be removed; to which the executor . . . may demur or answer, as hereinbefore provided." (Code Civ. Proc., sec. 1438.)

The court below found, among other things, that a certain ranch and mine and also a quantity of personal property situated in the county of Calaveras, and in the possession of Guttinger, belong to the estate of the testator and ought to be included in the inventory thereof, and that Guttinger has neglected to perform his duty as executor in failing and refusing to return and inventory such property as part of the estate. The appellant maintains that these findings were not sustained by the evidence. It appears that the whole value of the property as listed and appraised in the inventory actually filed is a little more than six thousand six hundred dollars, while the value of said Calaveras county property in the possession of Guttinger is one hundred and fifty thousand dollars. There is no dispute that it was all at one time owned by Rathgeb; but Guttinger, who is a nephew of Rathgeb, claims that the same was given to him by Rathgeb in his lifetime, and in support of his contention he produced at the hearing a deed, of date January 23, 1893, purporting to be an absolute conveyance from Rathgeb to him of the said real property, under which, as he testified, he took possession of the described premises about January 24, 1894, and ever since has held the same. There was no personal property described in the deed; and the record does not show specifically of what the Calaveras county personalty consisted; a particular description thereof was omitted from the tran-

script on appeal—possibly for the sake of brevity; it appears, however, to have been chattels on and about both the ranch and mine and used in connection therewith. In January, 1894, Guttinger got possession of the personality from one Holland, who had been Rathgeb's tenant of the ranch, in virtue of a written order for the possession thereof signed by Rathgeb and directed to Holland. He testified: "I claim this personal property because my uncle gave it to me, and I claim title to it. . . . I have no other title to the personal property except the order to Holland." There was other evidence on which the respondents claim, as we understand their position, that the ranch and mine described in the deed of January 23, 1893, were conveyed to Guttinger in trust merely and subject to the dispositions of the grantor's will. We do not find it necessary to decide whether this view of that conveyance, which was adopted by the trial court, is correct.

For, although Guttinger stated in a general way that his uncle gave him the personal property, yet he testified to no word or act of Rathgeb sufficient to constitute a gift thereof. The order on Holland for possession of the same, which he said was his only title, did not show a gift. It is also to be observed in considering the statement of Guttinger that the court below was the judge of his credibility; his testimony, in some material particulars, was confused and to some extent contradictory of itself; while this may well have been the result of innocent lapse of memory, or want of skill in our language (he being a Swiss), yet on appeal we are unable to say that the remark of the trial judge, in announcing his decision, that Guttinger's testimony had not been "at all satisfactory," is not warranted by the record.

It is contended that the statute of limitations as to said personal property had run in favor of Guttinger before the death of Rathgeb. Waiving other considerations on this point, it is sufficient to say that no defense under the statute was proved; for although Guttinger may have had possession of the chattels for more than three years before his uncle's death, it is shown that he came into possession permissively; it is therefore to be presumed that he held them as Rathgeb's bailee, and it does not appear that any claim by him to hold

the same adversely to his uncle was ever brought to the knowledge of the latter.

A further argument advanced is that Guttinger's position antagonistic to the estate in respect to the property is no ground for his amotion from the office of executor. *Estate of Bauquier*, 88 Cal. 302, is cited to sustain this contention. It was held in that case that letters testamentary cannot be refused to the executor named in the will on the ground that he claims, as his own, property which legatees insist belongs to the estate. The court there dealt with the statute prescribing the grounds for refusing letters upon application therefor (Code Civ. Proc., sec. 1350), and held that the courts have no right to add to the disqualifications imposed by the legislature in such cases. The case here is different; for, as the court said in the case cited: "The executor may always be removed after appointment unless he discharges the duties of his trust faithfully and as directed by law"; necessarily, therefore, the court has power to determine, for the purposes of an inquiry into that question, whether the executor has refused wrongfully to inventory or otherwise account for property of the estate in his possession, and to remove him if he persists in such conduct; else the necessary steps required by law in the course of administration might be indefinitely delayed or prevented by his mere assertion of title to the property in himself. (See *Deck v. Gherke*, 6 Cal. 666.) In our opinion, the evidence was sufficient to justify the decision that Guttinger wrongfully refused to return an inventory the Calaveras county personalty as a part of the estate of Rathgeb, and without sufficient reason asserted ownership thereof in himself; this was a clear neglect of his duty as executor, and was statutory ground for his removal. It is proper, perhaps, to add that neither the decision here nor that of the court below can estop Guttinger in a suit against him to recover any of said property for the estate; the superior court, in this summary proceeding, is not competent to decide finally upon the question of title.

It is also contended that no proper issues were made or tried touching the liability of Guttinger to be removed. This contention seems to rest mainly on the circumstances that no formal statement of charges was filed except the petition of

December 7, 1897, presented by his coexecutors. The objection is not well taken; said petition contained charges upon which the court, under the authority of sections 1436 and 1437 of the Code of Civil Procedure, suspended Guttinger's powers and cited him to appear and show cause why his letters should not be revoked; said section 1437 evidently contemplates that the charges which, if believed by the court, may be ground for suspending the representative, shall also, if proved upon a hearing, be ground for removing him, and we see no sufficient reason to say that when they are formulated in a sworn statement prior to issuing a citation to show cause they must afterward be reiterated in a separate document. (Compare *Estate of Kelley*, 122 Cal. 379, 382.) The provisions of section 1438, allowing any person interested in the estate to appear at the hearing and file charges against the representative, cannot be construed as requiring charges previously made to be filed anew, for the section further declares that the executor or administrator may demur or answer to allegations filed at the hearing "as hereinbefore provided"—apparently referring to proceedings already on foot to compel him to show cause, and in which he has, or may have, made answer.

Some minor questions of procedure are raised. We have inquisitively examined them all and find no prejudicial error. The order appealed from should be affirmed.

Haynes, C., and Gray, C., concurred.

For the reasons given in the foregoing opinion the order is affirmed. Harrison, J., Garoutte, J., Van Dyke, J.

Hearing in Bank denied.

[S. F. No. 1106. Department One.—July 6, 1899.]

**GEORGE STAACKE, Respondent, v. JOHN S. BELL et al.,
Appellants.**

PLEADING—PRAYER OF COMPLAINT—RELIEF AGAINST DEFAULTING DEFENDANT.—No relief can be granted against a defaulting defendant in excess of that specifically prayed for in the complaint; and the general prayer for relief cannot enlarge the power of the court to grant relief not prayer for against the defaulting defendant.

ID.—PRAYER IN ANSWER OF CODEFENDANTS.—A defaulting defendant has the right to assume that no relief will be granted beyond that which the complaint specifically seeks; and codefendants, whose answer is not served upon the defaulting defendant, cannot, by any prayer for affirmative relief therein, extend the specific relief properly granted, beyond that asked for in the complaint, as against such defaulting defendant.

VENUE OF REAL ACTION—DECREE TO BE CONSIDERED.—In determining whether an action is, in effect, a real action, quieting title to land, or enforcing a lien thereon, which must be brought in the county where the land is situated, the court will consider not only the prayer for relief in the complaint and answers, but also the terms of the decree.

ID.—DECREE AS TO EFFECT OF TRUST DEED.—Under the complaint in an action not brought in the county where the lands described in a trust deed were situated, seeking to renew the trust deed and the promissory note by which it was secured, so as not to affect the rights of the parties to a prior action pending in the county where the lands were situated, brought to enforce a trust in favor of other parties against the trustor, who were made defendants to the new action, and under answers of the creditor and trustees named in the trust deed, seeking to protect the trust deed as a paramount conveyance and lien, a decree adjudging that the original trust deed is a first charge on the lands, and is and shall remain prior and superior to any claim, charge, or lien to or on said lands in favor of the other parties, cannot be rendered. Such relief can only be had in an action brought where the lands are situated.

VALIDITY OF TRUST DEED—RESTRAINT UPON ALIENATION.—A trust deed to secure indebtedness payable at a fixed future date does not create a trust in violation of the statute against perpetuities or forbidding restraint upon alienation beyond the possibility of lives in being.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. D. J. Murphy, Judge.

The facts are stated in the opinion.

Crittenden & Van Wyck, Richards & Carrier, and Sidney M. Van Wyck, Jr., for Appellants.

The prayer for general relief could not enlarge the relief to be granted, which cannot exceed that specifically prayed for against the default in defendant. (Code Civ. Proc., sec. 580; *Mudge v. Steinhart*, 78 Cal. 40; 12 Am. St. Rep. 17; *Johnson v. Polhemus*, 99 Cal. 240; *Bailey Loan Co. v. Hall*, 110 Cal. 492; *Brooks v. Forington*, 117 Cal. 221; *Foley v. Foley*, 120 Cal. 42, 43; 65 Am. St. Rep. 147.) The court had no jurisdiction to grant the relief awarded in an action not commenced where the lands were situated. (Code Civ. Proc., sec. 392; Const., art. VI.; sec. 5; *Hancock v. Burton*, 61 Cal. 70; *Fritts v. Camp*, 94 Cal. 394, 398; *Pacific Yacht Club v. Sausalito Bay etc. Co.*, 98 Cal. 489; *Duffy v. Duffy*, 104 Cal. 602; *Rogers v. Cady*, 104 Cal. 292; 43 Am. St. Rep. 100; *Southern Pac. Co. v. Pixley*, 103 Cal. 120; *Urton v. Woolsey*, 87 Cal. 39.) The trust deed is invalid, as suspending the power of alienation for a fixed period. (*In re Walkerly*, 108 Cal. 646; 49 Am. St. Rep. 97.) Defendant's answer, not served upon appellant, could not justify relief in excess of the prayer of the complaint. (*Hibernia Savings etc. Soc. v. Clarke*, 110 Cal. 32; *Hibernia Savings etc. Soc. v. Fella*, 54 Cal. 598.)

H. C. Campbell, Sidney V. Smith, and E. H. Rixford, for Respondent.

The court had jurisdiction of the action, as one of equitable jurisdiction. (Const., art. VI.) The trustees were not entitled to possession of the land. (*Tyler v. Granger*, 48 Cal. 259.) An action to enforce a trust need not be brought in the county where the lands are situated, nor any equitable action *in personam*, though relating to lands elsewhere situated. (*More v. Superior Court*, 64 Cal. 345; *Le Breton v. Superior Court*, 66 Cal. 27; *Smith v. Smith*, 88 Cal. 577; *Warner v. Warner*, 100 Cal. 16; *Bailey v. Cox*, 102 Cal. 333; *Woodbury v. Nevada etc. Ry. Co.*, 120 Cal. 463.)

CHIPMAN, C.—The action is brought in the superior court of the city and county of San Francisco, and the complaint alleges that on February 1, 1892, plaintiff executed and delivered to defendant, San Francisco Savings Union, his promissory note, due February 1, 1893, for sixty thousand

dollars, to secure payment of which plaintiff executed a conveyance to defendants Henry C. Campbell and Thaddeus B. Kent of certain lands in Santa Barbara county. This conveyance is set out in the complaint and is an ordinary deed of trust. The complaint then alleges that on March 8, 1893, "the defendant John S. Bell commenced an action against plaintiff and the defendant John W. C. Maxwell in the superior court . . . in and for the county of Santa Barbara, which action is . . . undetermined. . . . That by the pleadings in said action it is claimed by all the parties thereto that this plaintiff holds said land in trust. That on the sixteenth day of October, 1892, said Thomas Bell died in the said city and county of San Francisco, leaving a last will, a copy whereof . . . made part hereof." Thomas Bell is not previously mentioned in the complaint, but appears in the title of the cause as deceased. There is no explanation in the complaint for making the heirs or executors of Thomas Bell parties to the action. The complaint then avers the appointment of plaintiff and defendant John W. C. Maxwell as executors of the will of said Thomas Bell; that the principal of the note and some interest are still due; that the San Francisco Union "is willing to renew said note and security, or to extend the time for the payment of said note, if plaintiff can procure proper authority to make such renewal or extension, but otherwise demands immediate payment of said note, and intends, in default thereof, to cause said lands to be sold by the trustees, Campbell and Kent, to satisfy said indebtedness; that said lands are of much greater value than the amount of said indebtedness, if sold in parcels and at a time when there is a demand for such property, but at present the market for such property is depressed, and . . . that if said property should be sold at this time by said trustees it would probably realize but little if any more than sufficient to pay said indebtedness." There is nothing in the complaint to show the nature of the trust referred to in the action pending in Santa Barbara county, or when it arose. The prayer is for the judgment of the court "authorizing and directing plaintiff to execute a new note in place of the note above mentioned, or a renewal of the note above set forth, and a deed of trust to secure the same, such new note or renewal note and deed of

trust and the judgment herein not to in any way affect the rights of the parties to said action pending in Santa Barbara county but leaving said rights to be determined in said action, subject always to the deed of trust aforesaid, or any deed of trust that may be authorized by the judgment herein," and for general relief. Trustees Campbell and Kent and the Savings Union filed separate answers in which they set up many facts additional to those found in the complaint, and prayed for relief different from and in excess of that asked by the complaint. The decree adjudges that the deed of trust mentioned in the complaint "is and shall remain prior and superior to any claim, charge, or lien to or on said lands of the defendants John S. Bell (naming the other defendants except Campbell, Kent, and Savings Union), or any of them; that the said note and deed of trust were executed with full knowledge and consent of Thomas Bell; that subject to said deed of trust the plaintiff holds the legal title to said lands . . . in trust for the defendant John S. Bell and the other defendants (naming them) as their interests may be determined in the suit now pending" in the superior court of Santa Barbara county referred to in the complaint; it is also adjudged and ordered that plaintiff, "on his own behalf and as trustee as aforesaid be and he is hereby authorized and directed to execute an instrument in writing renewing said note and extending the time for the payment of the principal thereof in words and figures following." Then follows a prescribed form of instrument to be executed by the parties. Appellant and the executors of Thomas Bell made default; the other defendants answered; plaintiff had judgment, from which defendant John S. Bell appeals on the judgment-roll alone; the answers to the complaint were not served upon him. The grounds of the appeal are: 1. The relief granted is in excess of that demanded in the complaint; 2. Want of jurisdiction; and 3. Insufficiency of the complaint.

1. Where there is no answer the relief granted plaintiff "cannot exceed that which shall have been demanded in his complaint." (Code Civ. Proc., sec. 580.) It is improper to grant relief other and different from that prayed for in the

complaint (*Mudge v. Steinhart*, 78 Cal. 34, 12 Am. St. Rep. 17; *Bailey Loan Co. v. Hall*, 110 Cal. 492); nor can the general prayer enlarge the power of the court to grant relief not prayed for against a defaulting defendant. In the case here, the court did not decree a renewal of the deed of trust, and that part of the prayer may be put aside. As we read the prayer of the complaint, so far as appellant is concerned, the judgment was not to affect his rights in the action pending in Santa Barbara county. The language is "not to in any way affect the rights of the parties to said action pending in Santa Barbara county, but leaving said rights to be determined in said action." It is true the prayer also says, "subject always to the deed of trust aforesaid, or any deed of trust that may be authorized by the judgment herein." Whether or not this latter clause was intended as a limitation of the clause preceding it, we think it clear enough that the complaint notified appellant that plaintiff intended to ask a decree, not as trustee of anybody, but individually, as he had executed the note and deed of trust, authorizing him to renew the note, and that the decree should be so drawn as "not to in any way affect the rights of the parties to said action pending in Santa Barbara county." Of course, the Savings Union would not consent and did not consent unless the renewal could be made so as to preserve its rights as they then stood, but, nevertheless, we think appellant had the right to make default on the assumption that his rights also in the Santa Barbara action would not be affected. The decree, however, goes far beyond the prayer and grants the relief prayed for by the Savings Union and trustees Campbell and Kent in their answers, which were not served upon appellant, and of the nature and contents of which he had no notice. Appellant could rest secure under section 580 of the Code of Civil Procedure, and the allegations of the complaint that the judgment was "not to in any way affect the rights of the parties" in the action pending in Santa Barbara county. The decree as to appellant was in excess of the relief demanded in the complaint in adjudging that the deed of trust given by plaintiff is a first charge upon the lands; that plaintiff holds the lands in trust for appellant subject to said deed of trust; that the instrument to be executed by plaintiff should be executed by him as trustee of appellant; and should recite that when the deed of trust was executed by plaintiff, he,

plaintiff, "was by the San Francisco Savings Union believed to be the owner in fee in his own right of the lands described in the deed of trust"; and also in directing that plaintiff should, as trustee of appellant, execute a renewal contract. These matters seem to have found their way into the decree from allegations in the answers referred to and evidence submitted in support thereof, and whether or not they were proper to be litigated in the action, it is clear to our minds that the complaint did not inform defendants of any such issues and appellant is not bound by the judgment as to them.

2. As the judgment must be reversed, and as a decree equally comprehensive with the purpose disclosed by the answers may be sought upon a second trial of the action, it seems necessary to dispose of the question of jurisdiction. The constitution, article VI, section 5, provides "that all action . . . quieting title to or for the enforcement of liens upon real estate shall be commenced in the county in which the real estate . . . affected by said action . . . is situated." The constitution does not prohibit the trial elsewhere if the action is commenced in the proper county, notwithstanding the provisions of section 392 of the Code of Civil Procedure. (*Hancock v. Burton*, 61 Cal. 70; *Duffy v. Duffy*, 104 Cal. 602.)

But if the action falls within any of the classes enumerated in the constitution it must be commenced in the county in which the real estate affected by the action is situated. The only question here, then, is: Does the relief asked by the complaint and answers have the effect to quiet the title of the Savings Union, or is it for the enforcement of its lien? We may look to the decree to determine the real purpose of the action, and are not confined to the phraseology of the prayer for relief. (*Fritts v. Camp*, 94 Cal. 394; *Pacific Yacht Club v. Sausalito etc. Co.*, 98 Cal. 489.) Conceding, but not deciding, that the superior court of San Francisco could direct the plaintiff to execute a new note and trust deed, so as "not in any way to affect the rights of the parties" in the Santa Barbara action, as is asked in the complaint, it could not adjudge that the original trust deed is a first charge on the Santa Barbara lands, or that it was a valid conveyance, and thus

prevent a person having title to that land from claiming the right to have his title litigated and its validity determined in the county where the land is situated. Trustees may, in proper cases, apply to any court of the state, of general jurisdiction, for directions as to the conveyance of the trust estate, but trustees, equally with other persons, are bound by the provisions of the constitution, and if they seek a decree quieting their own title to real estate, or that of some other person, or for the enforcement of any lien upon real estate, they must commence the action in the county where the land is situated. Respondent claims that the action is one to administer a trust and to authorize the trustee to do certain things for the preservation of the trust, and therefore does not come within the constitutional inhibition. In support of the contention we are cited to *More v. Superior Court*, 64 Cal. 345; *Le Breton v. Superior Court*, 66 Cal. 27, and other cases. The first of these cases involved the removal of certain trustees and the appointment of others in their stead and the appointment of a receiver to take, hold, and protect the property pending the action. The second involved a proceeding to enforce a trust on personal and real property. No attempt was made in either of the cases to have adjudged the superiority of any title under the trust deed. In the case here the decree apparently goes to the extent of adjudicating the priority of the title under the trust deed over the claims and title of appellant, and it may be of others. The decree is one in its effect to determine title to land, and practically to quiet title to lands, if, indeed, it is not also in effect to enforce a lien thereon by compelling the conveyance of a title declared to be prior to all other claims. Such a decree we do not think could be entered except in an action commenced in a county where the land is situated.

Without discussing the sufficiency of the complaint, which seems unnecessary, we may remark that the trust deed is not void upon the ground that it creates a trust in violation of the statute against perpetuities. (*Sacramento Bank v. Alcorn*, 121 Cal. 379; *Camp v. Land*, 122 Cal. 167.)

It is advised that the judgment should be reversed.

Haynes, C., and Cooper, C., concurred.

For the reasons given in the foregoing opinion the judgment is reversed. Garoutte, J., Harrison, J., Van Dyke, J. Hearing in Bank denied.

[S. F. No. 1143. Department Two.—July 6, 1899.]

EBENEZER WORMOUTH, Respondent, v. PETER GARDNER, et al., Appellants.

PUBLIC LANDS—CONTEST BETWEEN CLAIMANTS—JURISDICTION OF LAND DEPARTMENT.—The land department has exclusive jurisdiction to determine all facts, and all inferences of fact, arising upon a contest between claimants of the public lands; and it is only where it is manifest that the land department decided the case upon an erroneous proposition of law, that its decision is reviewable by the courts.

ID.—HOMESTEAD CLAIM—CLAIM UNDER ACT TO QUIET LAND TITLES—CONCLUSIVE FINDINGS OF FACT.—Upon a contest in the land department of the United States between a homestead claimant and a claimant under the act of July 23, 1866, to quiet land titles in California, claiming by virtue of a deed from the heirs of a Mexican grantee of lands excluded from the grant by the survey and patent, where there is nothing in the proceedings of the land department to show that its decision was founded upon an erroneous view of the law, its findings of fact in favor of the homestead claimant, to whom the patent was issued, and against the other claimants, that the land in controversy was never included within the boundaries of the Mexican grant, and was never so regarded, and that the grantee of the heirs, at the time of the deed to him, knew, or had reason to believe, that it was not so included, and that he was not a *bona fide* purchaser thereof, within the meaning of that act, are conclusive, and cannot be reviewed by the court.

ID.—PATENT UNDER MEXICAN GRANT—BOUNDARIES.—The United States States patent to the heirs of a Mexican grantee is finally determinative of the boundaries of the grant.

APPEAL from a judgment of the Superior Court of Marin County, and from an order denying a new trial. F. M. Angclotti, Judge.

George W. Monteith, and Hepburn Wilkins, for Appellants.

L. D. McKissick, and E. B. Mahon, for Respondent.

McFARLAND, J.—This is an action in ejectment to recover possession of certain lands described in the complaint. Judgment below went for plaintiff, and defendants appeal from the judgment and from the order denying a motion for a new trial.

Plaintiff claims title under a homestead entry made in accordance with the United States laws upon that subject (see *Wormouth v. Gardner*, 105 Cal. 149), and before the filing of the cross-complaint hereinafter mentioned he received a United States patent for the land in pursuance of his homestead entry. The principal contention of defendants for a reversal is in relation to what they call their equitable title. This title, as shown in the cross-complaint, is briefly as follows: It is averred that the land in contest here was within the exterior boundaries of a certain Mexican grant, made in 1835 to Juan Reed, of a certain tract of land called the Rancho Corte de Madera del Presidio—usually called the Reed rancho; that this grant was presented to the land commissioners and the United States district court, and was confirmed; that a United States patent to the rancho was issued to the heirs of Reed in February, 1885, and that the patent excluded the land in contest in this case, and that the Reed heirs supposed the land was included within said grant, and with that understanding conveyed the same to various parties, through whom, by mesne conveyance, whatever right they had to this piece of land became vested in the defendant, Jacob Gardner, whose immediate grantor was one Throckmorton. It is further averred that in January, 1875, the said Throckmorton made application to the United States land department to purchase said lands under the act of Congress entitled, "An act to quiet titles in California," approved July 23, 1866, basing his application upon the facts hereinbefore stated, and that the plaintiff herein, Wormouth, was made a party defendant in said application, and that a contest took place in the land department between Throckmorton, upon his claim as aforesaid, and Wormouth, as a homestead claimant; that the register and receiver of the United States land office at San Francisco, in which application was made, decided the case in favor of Wormouth, and against Throckmorton; that Throckmorton appealed to the commis-

sioner of the general land-office, who also decided the case against him; and that he then appealed to the secretary of the interior, who again decided the case against him and in favor of Wormouth; but that each of said officers decided the case upon an erroneous proposition of law; and that therefore it ought to be decreed that the plaintiff holds said land in trust for defendant, Jacob Gardner, and should convey the same to the latter. A demurrer to this cross-complaint was sustained by the court below, but upon appeal this court held that the averments of the complaint were sufficient on their face to show that the decision of the land department had been based upon an erroneous construction of the law, and reversed the case with directions to the court below to overrule the demurrer—the court declaring, however, in its opinion, very clearly, the principles upon which it should be determined whether or not the decision of the land department was final. (See *Wormouth v. Gardner*, 112 Cal. 506.) After the *remittitur* went down the plaintiff filed an answer, in which all the material averments of the cross-complaint were denied. Upon the trial, the defendants introduced all the proceedings had in the land department in the said contest of Throckmorton and Wormouth. That contest was one entirely within the jurisdiction of the United States land department, that is, each party was endeavoring to get title to what each admitted to be United States government land, which was subject to disposition under the laws of the United States. The land department, therefore, had exclusive jurisdiction to determine all facts which arose in the contest; and in order to successfully attack the decision of the department the defendant in this present case would have to show that such decision was founded upon an erroneous notion of the law. But this he has failed to do. The department, among other things, found that the land in contest never was within the boundaries of the grant to Reed; that it was never regarded as being included in that grant, and that Throckmorton, at the time he claimed to have purchased from the Reed heirs, either knew or had good reason to believe that the land was not included in the grant, and was not a *bona fide* purchaser within the meaning of the act of July 23, 1866. In *Wormouth v. Gardner*, 112. Cal. 506, this court said:

"Whether Throckmorton did, in fact, purchase the land for a valuable consideration, or whether after his purchase he used and improved and continued in the actual possession of the same, according to the lines of his purchase, were questions of fact to be determined by the secretary of the interior. The good faith of Throckmorton in making the purchase, as well as his belief that the land he purchased was included within the original limits of the Mexican grant, were also facts to be determined by that officer from all the circumstances under which the purchase was made. Whether that officer properly considered the weight to which the evidence before him was entitled, or whether he drew correct conclusions from that evidence, his determination with reference to these facts, whether correct or erroneous, is conclusive upon the judicial tribunals. These tribunals cannot exercise a revisory jurisdiction over him in matters which are within the scope of the authority conferred upon him, but if, upon the undisputed facts, he made an erroneous application of the law pertinent to those facts, his action is open to review." In the case at bar, it nowhere appears that the secretary of the interior made an erroneous "application of the law," but it does appear that his decision was based upon facts which necessarily defeated the claim of Throckmorton. For the same reasons the decision of the United States land department was conclusive as to Wormouth's title as a homestead claimant.

What appellant claims as his legal title was presented to the jury in the shape of an issue as to damages for detention of the land. The jury found a verdict of two thousand dollars, which the court reduced to sixteen hundred dollars. The United States patent to the Reed heirs was finally determinative of the boundaries of the grant; and we see no other point in the case necessary to be discussed.

The judgment and order appealed from are affirmed.

Temple, J., and Garoutte, J., concurred.

Hearing in Bank denied.

[Sac. No. 404. Department One.—July 10, 1899.]

BANK OF WOODLAND, Respondent, v. WILLIAM OBERHAUS et al., Appellants.

ACKNOWLEDGMENT—MINISTERIAL ACT.—The act of a notary in taking an acknowledgment of an instrument is ministerial, and not judicial, in its nature.

ID.—AGENCY OF NOTARY—INTEREST IN TRANSACTION.—Notaries public are not disqualified by reason merely of being agents of the parties to the instruments to be acknowledged, if they are not pecuniarily interested in the transaction.

ID.—MORTGAGE TO BANK—ACKNOWLEDGMENT BY CASHIER.—The acknowledgment of a mortgage to a bank before a notary who was cashier of the bank, is not for that reason alone invalid, if it appears that the cashier had no interest in the bank or in its property, but was a mere salaried officer, and that his position as notary was distinct from his position as cashier, and that the fees received by him as notary belonged to him individually, and not to the bank.

HOMESTEAD—SELECTION REQUIRED—RESIDENCE PRIOR TO CODES—VALIDITY OF MORTGAGE.—There can be no legal homestead since the enactment of the codes, merely from residence, without selection, and the record of a declaration thereof, notwithstanding the husband and wife may have resided upon the premises since a date prior to the codes; and a mortgage executed and recorded before a declaration of homestead is filed is a valid charge upon the premises.

APPEAL from a judgment of the Superior Court of Yolo County and from an order denying a new trial. W. H. Grant, Judge.

The action was for the foreclosure of two mortgages upon property of the defendants situated in Yolo county, executed by the defendants, husband and wife, to the Bank of Woodland, and acknowledged by both of the defendants November 7th, 1893, before C. F. Thomas, notary public. The mortgages were made to secure an individual note of the husband; and were renewals of former mortgages executed several years previously by the husband alone. The premises were acquired in 1863, and were used as a family residence continuously from April, 1867. The defendants pleaded that C. F. Thomas was cashier and business manager of the Bank of Woodland, and that the debts were contracted and the mort-

gages executed under his management and at his request as cashier, agent, general and business manager of the plaintiff, and that he was disqualified to take the acknowledgment of the mortgages. Further facts are stated in the opinion.

Charles W. Thomas, for Appellant.

The mortgage, not being properly acknowledge, did not create any charge upon the homestead. (*Landers v. Bolton*, 26 Cal. 393, 408; *McQuade v. Whaley*, 31 Cal. 526, 538; *Merced Bank v. Rosenthal*, 99 Cal. 39, 49; *Montana Nat. Bank v. Schmidt*, 6 Mont. 609.) The homestead acts of 1860 and 1862 attached to the premises by virtue of the family residence thereon since April, 1867. The filing of a declaration of homestead under the code was not a conveyance, or the creation of a new title to the homestead, but was declaratory of the interest created by the previous family residence. (*Ontario State Bank v. Gerry*, 91 Cal. 94, 97; *First Nat. Bank v. Bruce*, 94 Cal. 77; *Beaton v. Reid*, 111 Cal. 484; *Fitzell v. Leaky*, 72 Cal. 477, 483.) The homestead law should be liberally construed in favor of the claimant. (*Southwick v. Davis*, 78 Cal. 504, 507; *Schuyler v. Broughton*, 76 Cal. 524, 525; *Heathman v. Holmes*, 94 Cal. 291, 296; *City Store v. Cofer*, 111 Cal. 482; *Beaton v. Reid*, *supra*.) The taking of an acknowledgment is a quasi judicial act. (*Wedel v. Herman*, 59 Cal. 507, 513; *People v. Bartels*, 138 Ill. 322; *Wasson v. Connor*, 54 Miss. 351; *Long v. Crews*, 113 N. C. 256; *Beaman v. Whitney*, 20 Me. 413; *Groesbeck v. Seeley*, 13 Mich. 329; *Davis v. Beazley*, 75 Va. 491; *Bowden v. Parrish*, 86 Va. 67; 19 Am. St. Rep. 873; *Brown v. Moore*, 38 Tex. 645.) The cashier is the executive officer of the bank, and represents it as its legal executive. (4 Thompson on Corporations, sec. 4740; *United States v. City Bank*, 21 How. 356, 364.) The cashier held a trust relation to the bank, and was its executive agent, and business manager and representative; and he was disqualified to take the acknowledgment. (*Merced Bank v. Rosenthal*, *supra*; *Holden v. Brimage*, 72 Miss. 228; *Hogans v. Carruth*, 18 Fla. 587; *West v. Krebaum*, 88 Ill. 263; *Hubble v. Wright*, 23 Ind. 322; *Wilson v. Traer*, 20 Iowa, 231; *Groesbeck v. Seeley*, *supra*; *Lap-*

rad v. Sherwood, 79 Mich. 520; *Wasson v. Connor*, *supra*; *Hainey v. Alberry*, 73 Mo. 427; *Beaman v. Whitney*, *supra*; *Stevens v. Hampton*, 46 Mo. 404; *Brown v. Moore*, 38 Tex. 645; *Tavener v. Barrett*, 21 W. Va. 658; *Bowden v. Parrish*, 86 Va. 67; 19 Am. St. Rep. 873; *Withers v. Baird*, 7 Watts, 227; 32 Am. Dec. 754; *Kimball v. Johnson*, 14 Wis. 674; 683; *Sample v. Irwin*, 45 Tex. 567; *Nichols v. Hampton*, 46 Ga. 253; *Rothschild v. Dougher*, 85 Tex. 332; 34 Am. St. Rep. 811; *Corey v. Moore*, 86 Va. 721; *Long v. Crews*, *supra*; *Davis v. Beazley*, *supra*; *Smith v. Clark*, 100 Iowa, 605; *Jones v. Porter*, 59 Miss. 628; *Armstrong v. Combs*, 44 N. Y. Supp. 171; 15 N. Y. App. Div. 246.)

N. A. Hawkins, for Respondent.

The declaration of homestead filed after suit of foreclosure commenced and *lis pendens* filed, was subject to the mortgages, without reference to the validity of the acknowledgment. (*Hastings v. Vaughn*, 5 Cal. 314; *Ricks v. Reed*, 19 Cal. 551, 557; *Landers v. Bolton*, 26 Cal. 393; *Downing v. Le Du*, 82 Cal. 471; *Tolman v. Smith*, 85 Cal. 282; *Grant v. Oliver*, 91 Cal. 159; *Delano v. Jacoby*, 96 Cal. 276; 31 Am. St. Rep. 201; Civ. Code, secs. 1214, 1217; *Roach v. Riverside Water Co.*, 74 Cal. 263.) There being nothing on the face of the acknowledgment to show any disqualification of the notary, the instrument was entitled to record, and imparted constructive notice. (Webb on Record Title, sec. 67; *Bank of Benson v. Hove*, 45 Minn. 40; *Stevens v. Hampton*, 46 Mo. 404, 408; *Heilbrun v. Hammond*, 13 Hun. 477, 489; *Titus v. Johnson*, 50 Tex. 224, 240; *National Bank v. Conway*, 1 Hughes, 37; *Bank of Merced v. Rosenthal*, 99 Cal. 39, 47; *Lee v. Murphy*, 119 Cal. 364.) The cashier was not interested in the bank, but was merely a salaried officer, and his office as cashier had nothing to do with his action as notary. A mere agent for one of the parties without personal interest in the transaction is not disqualified to take an acknowledgment. (*Bank of Benson v. Hove*, *supra*; *Penn v. Garvin*, 56 Ark. 511; *Sawyer v. Cox*, 63 Ill. 130 *Horbach v. Tyrrell*, 48 Neb. 514; *Kutch v. Holley*, 77 Tex. 220; *Helena etc. Bank v. Roberts*, 9 Mont. 323; *Florida Sav. Bank v. Rivers*, 36 Fla. 575; *Kimball v. Johnson*, 14 Wis. 674; *Bierer v. Fretz*, 32 Kan. 330; *Reavis v. Cowell*, 56 Cal. 591; *Lynch*

v. Livingston, 6 N. Y. 433; *Nixon v. Post*, 13 Wash. 181; *Remington Paper Co. v. O'Dougherty*, 81 N. Y. 474, 478, 483.) The action of a notary on taking an ordinary acknowledgment is ministerial only. (*Horbach v. Tyrrell, supra*; *People v. Bartels*, 138 Ill. 322; *People v. Bush*, 40 Cal. 346.)

VAN DYKE, J.—The main contention on the part of the appellant is that the mortgages are invalid on the ground that the acknowledgments, having been taken before the cashier of the plaintiff bank, are void. The court finds that C. F. Thomas, the notary who took the acknowledgments of said mortgages, was the cashier of the plaintiff bank, but that he was not a stockholder in said bank, nor a director thereof, but an appointee of the board of directors and employed by them as such cashier upon a fixed and definite salary. The evidence fully supports this finding, and further shows that he had no interest in the property or income of the bank; that his services were neither increased nor diminished by its gains or losses, and that his business as notary was distinct and independent of his duties as cashier of the bank, and whatever fees he received or collected as notary were his individually, and did not go to the bank.

In some of the states it has been held that a notary, in taking an acknowledgment, acts judicially; in others, that he acts ministerially. *Elliott v. Peirsol*, 1 Pet. 328, was a case that went up from Kentucky, where the clerk was authorized by statute to take and certify the acknowledgments of deeds, and the court there say: "We are of opinion he acted ministerially, not judicially, in the matter," and held that after his certificate passed from his hands he had no power of correcting it. This court in *Bours v. Zachariah*, 11 Cal. 295; 70 Am. Dec. 779, after quoting from that case, say: "Where is the difference between the clerk's power ceasing on his recording the deed and certificate, and the notary's power ceasing after recording by the clerk? . . . The whole reasoning of the court in the section quoted is direct to show that the notary could have no such authority; for all the evils which are so well stated would follow as well from permitting alterations of the record to be made by amendments of the notary as of the clerk." There are some decisions to the effect that

where the acknowledgment is a necessary part of the execution of the instrument, as in some cases in reference to the acknowledgment of a married woman, that then the officer acts judicially in taking the acknowledgment. When these mortgages were executed, however, it required no separate acknowledgment on the part of the wife.

But in this state it would seem that a notary public does not exercise judicial functions. The constitution prescribes where the judicial power of the state is lodged, and what courts and officers exercise judicial power, and notaries public are not included therein. (Const. art. VI.) Upon principle, it would seem that the act of a notary in taking the acknowledgment of a conveyance is not judicial in its nature. For judicial acts the officer is not liable either for ignorance or negligence, but only for corrupt and intentional misconduct in the discharge of his official duties. On the other hand, ministerial officers are pecuniarily liable for negligence, regardless of intentions, whether good or bad. It has been held in this state that a notary public and his bondsmen are liable for damages caused by negligence in taking the acknowledgment of a conveyance or mortgage. (*Fogarty v. Finlay*, 10 Cal. 239; 70 Am. Dec. 714; *Heidt v. Minor*, 89 Cal. 115.) In *People v. Bush*, 40 Cal. 334, the court distinguishes between ministerial and judicial duties, saying: "A judicial officer may be required by law to discharge other than judicial duties. He may, by authority of law, perform ministerial acts, but when performed they do not become judicial acts because they are performed by a judicial officer. This becomes apparent on a moment's consideration. A county judge is authorized, among other things, to take the acknowledgment of a deed and to solemnize a marriage. No one will contend that in performing those acts he exercises judicial functions." It has been held that notaries public, where attorneys or agents of parties, were not for that reason disqualified in taking acknowledgments or protesting bills where they are not pecuniarily interested in the transaction. (*Horbach v. Tyrrell*, 48 Neb. 514; *Penn v. Garvin*, 56 Ark. 511; *Moreland v. Citizen's Sav. Bank*, 97 Ky. 211; *Florida Sav. Bank v. Rivers*, 36 Fla. 575.) We think the notary in this case was not disqualified from taking the acknowledgments of the mortgages in question.

It is further contended by the appellant that the homestead antedated the execution of the mortgage, from the fact that the defendants made the premises their home and resided thereon. Since the codes there can be no legal homestead merely from residence without selection. "The homestead consists of the dwelling-house in which the claimant resides and the land on which the same is situated, selected as in this title provided." (Civ. Code, sec. 1237.)

The mortgages in suit were acknowledged respectively August 26, 1892, and November 7, 1893, and recorded of those dates. Suit was brought for their foreclosure, and *lis pendens* filed and recorded October 19, 1895. Although the parties resided on the premises in question a number of years before the execution of the mortgages, the declaration of the homestead was not filed until November 4, 1895. "The homestead is subject to execution or forced sale in satisfaction of judgments obtained. . . . 4. On debts secured on mortgages upon the premises and recorded before the declaration of homestead was filed for record." (Civ. Code, sec. 1241.)

The judgment and order denying a new trial are affirmed. Harrison, J., and Garoutte, J., concurred.

[Crim. No. 492. In Bank.—July 10, 1899.]

THE PEOPLE, Respondent, v. HARRY WINTERS, Appellant.

CRIMINAL LAW—HOMICIDE—INSTRUCTION—REASONABLE DOUBT.—Upon the trial of a defendant charged with murder, where the court has given a full and correct instruction upon the subject of reasonable doubt, it is not erroneous, or objectionable as being argumentative in form, to instruct the jury that "the doubt which acquits a defendant on trial on a charge of crime must be a reasonable doubt in the sense mentioned, and no other."

ID.—INSTRUCTION AS TO DISTRUST OF FALSE WITNESS.—An instruction "that a witness ascertained or appearing to be willfully false in one part of his testimony, as to the truth or falsity of a given proposition, is to be distrusted in other parts," though somewhat out of the ordinary form, is not substantially objectionable.

ID.—INSTRUCTION AS TO ALIBI—DEFENSE—PROOF—REASONABLE DOUBT.
—A statement in an instruction upon the subject of alibi, that

"such a defense is as proper and legitimate, if proved, as any other defense," is not strictly correct. An alibi is not matter of defense; and the words, "if proved," standing alone, would be misleading. But where such statement is immediately followed by the statement to the jury that if the evidence is sufficient to raise a reasonable doubt as to whether the defendant was in some other place when the crime was committed, or not present at the time and place of its commission, they should give him the benefit of the doubt and acquit him, the instruction, as a whole, is not misleading.

ID.—REQUESTED INSTRUCTION AS TO ALIBI.—An instruction requested by the defendant upon the subject of alibi, which assumes to give defendant the benefit of any doubt raised, omitting the qualification of reasonable doubt, is properly refused.

ID.—ARGUMENTATIVE INSTRUCTION—IDENTITY OF DEFENDANT.—An argumentative instruction as to the identity of the defendant, based upon the facts, and not containing any proposition of law, is properly refused.

ID.—INSTRUCTION AS TO DEFENDANT'S TESTIMONY—PROVINCE OF JURY.—A requested instruction that the jury "are not permitted under the law to discredit or reject the testimony of the defendant, simply on the ground that he is accused and on trial on a criminal charge," is properly refused, as being upon matter of fact, and not of law, and as invading the province of the jury, who are the sole judges of the credit to be given to the testimony of any witness.

ID.—CONTINUANCE—INSUFFICIENT SHOWING.—A continuance on the ground of the absence of witnesses for the defendant is properly refused, where the affidavits therefor do not show that the defendant has used any diligence to secure their attendance, or that their attendance could be procured at a subsequent day, if the continuance had been granted.

ID.—EVIDENCE—DECLARATIONS OF CONSPIRATOR—HEARSAY—ERROR WITHOUT PREJUDICE.—Declarations of a conspirator with the defendant, made after his arrest, and not in the presence of the defendant, as to whence he came, where he was going, and what was his business, are inadmissible hearsay, but if there is nothing in the declarations tending to implicate either the defendant or the declarant, the error in admitting them is without prejudice.

ID.—IDENTIFICATION OF PISTOL PURCHASED BY DEFENDANT.—Where the homicide was in fact committed by the coconspirator, it is proper to identify a pistol found upon him as a pistol purchased by the defendant, as tending to connect the defendant with the commission of the crime.

APPEAL from a judgment of the Superior Court of San Mateo County and from an order denying a new trial. George H. Buck, Judge.

The facts are stated in the opinion of the court.

Nagle & Nagle, for Appellant.

W. F. Fitzgerald, Attorney General, and C. N. Post, Deputy Attorney General, for Respondent.

GAROUTTE, J.—The defendant has been convicted of the crime of murder, and the death penalty adjudged. Upon appeal, he complains of various errors of law committed by the trial court.

A very full instruction upon the law of "reasonable doubt" was given to the jury, and it was therein said: "You are instructed that the doubt which acquits a defendant on trial on a charge of crime must be a reasonable doubt in the sense mentioned and no other." Inasmuch as the instruction contained a full and sound statement of the law bearing upon the matter of reasonable doubt, there can be no valid objection to the foregoing language used by the court. Neither is the instruction susceptible to the objection that it is argumentative in form.

The following instruction was given: "You understand, of course, that a witness ascertained or appearing to be willfully false in one part of his testimony as to the truth or falsity of a given proposition of fact, is to be distrusted in other parts." While this instruction is somewhat out of the ordinary form bearing upon the subject matter covered by it, still we find no substantial objection to it.

Upon the question of alibi the court said to the jury: "Such a defense is as proper and legitimate, if proved, as any other defense, and all the evidence bearing upon that point, if any, should be considered by you, and if, in view of all the evidence, you have any reasonable doubt as to whether the defendant was in some other place when the crime was committed, you should give the defendant the benefit of the doubt. In other words, the defendant is not bound or required to prove an alibi beyond a reasonable doubt to entitle him to an acquittal. It is sufficient if the evidence upon that point, if any, raises a reasonable doubt in your minds of his presence at the time and place of the commission of the crime charged." Taken as a whole, this instruction is correct. In substance it states the law. There are a few expressions contained therein which could well have been omitted. As, for

instance, strictly speaking, the matter of alibi is not a matter of defense. Again, the jury were told: "That such a defense is as proper and legitimate, if proved, as any other defense." The words "if proved," standing alone, would be seriously misleading, for an alibi in no sense in order to be successfully invoked need be proved, as that word is ordinarily used. (See *People v. Roberts*, 122 Cal. 377.) But it is perfectly evident from the context, taking the entire instruction together, that the court, in using those words, simply intended them to mean a sufficient degree of proof to raise a reasonable doubt in the minds of the jury. We find many courts and law-writers referring to an alibi as matter of defense, and also stating that it must be proved by defendant. We doubt the legal propriety of using either one of these expressions in those jurisdictions where it is held that an alibi is sufficiently established when a reasonable doubt is raised in the minds of the jurors as to the presence of the defendant at the scene of the crime. Yet these terms are used and held unobjectionable in all those instructions where the jury are clearly and fully told that a reasonable doubt in their minds as to the presence of the defendant at the scene of the homicide entitles him to an acquittal. In all those cases the word "proved" is held to mean the production of sufficient evidence to raise a reasonable doubt.

We find these terms used in that standard work, the American and English Encyclopedia of Law, second edition, page 56, where it is said: "The true doctrine seems to be that where the state has established a *prima facie* case, and the defendant relies upon the defense of alibi, the burden is upon him to prove it, not beyond a reasonable doubt, nor by a preponderance of the evidence, but by such evidence, and to such a degree of certainty, as will, when the whole evidence is considered, create and leave in the mind of the jury a reasonable doubt of the guilt of the accused." An abundance of authority is there cited where the law is stated to the same effect. See, also, *State v. Thornton*, 10 S. Dak. 349, in which case the whole question is exhaustively discussed and a similar instruction to that here given approved. Again we say we do not indorse the statement. "An alibi, if proved, is a good defense," as a strictly correct statement of a proposition

of law. Yet, in view of the fact that in the same instruction and almost in the same line of the instruction we find the court telling the jury that if a reasonable doubt is raised in their minds from the evidence as to the presence of the defendant at the scene of the homicide, then such doubt entitled him to an acquittal, it cannot be possible that the jury misunderstood the law.

In this same instruction it is also said: "In other words, the defendant is not bound or required to prove an alibi beyond a reasonable doubt to entitle him to an acquittal." This statement is eminently true as a proposition of law, but not necessary to be stated in view of the other portions of the instruction. Yet, being given, it could well have been supplemented by the additional statement that not even a preponderance of evidence was necessary to sustain a claim of alibi. This, in effect, was stated when the charge declared in terms, that if a reasonable doubt was raised in the minds of the jurors from the evidence as to the defendant's presence at the scene of the homicide, then he was entitled to the benefit of such doubt and an acquittal.

That portion of the instruction referring to the defendant being "in some other place when the crime was committed" we believe is clearly correct. The instruction offered by defendant, and which was refused, upon the question of identity, was properly refused. It did not contain a statement of a principle of law, but an argument based upon facts.

The instruction offered by defendant and refused, bearing upon the question of alibi, was properly refused. It omits the all-important qualification that the doubt must be a *reasonable* doubt. This court has repeatedly held such an instruction fatally defective.

Complaint is made by reason of the court's refusal to give the following instruction: "The defendant has offered himself as a witness, and has taken the stand as such in his own behalf. This is his legal right, and you are not permitted under the law to discredit or reject his testimony simply on the ground that he is accused and on trial on a criminal charge." We have repeatedly cautioned trial courts upon the inadvisability of giving instructions to the jury tending to discredit the testimony of the defendant. A long line of

modern cases to this effect may be found in our state reports. Such instructions rest upon the border line of error, as trespassing upon the constitutional rights of the jurors in weighing and testing the credibility of witnesses. As has been often said, that class of instructions will be limited within the strictest lines. In this case it is now asked for a reversal of the judgment because an instruction in behalf of defendant incorporating this principle of law has been refused. We are clear that it was properly refused. The credit to be given to the testimony of every witness, the defendant and all other witnesses, is a matter for the jury alone—a matter with which the court has nothing to do. It is a matter of fact, not a matter of law.

Defendant's showing for a continuance is wholly inadequate. It is not disclosed by his affidavits that he had used any diligence to secure the attendance of the two witnesses to which reference is made and whose presence he desired; and there is nothing whatever to indicate that their attendance could have been procured at a subsequent day if a continuance had been granted.

It is claimed that the defendant and one Raymond entered into a conspiracy to burglarize in the night-time the Grand Hotel, situated in the village of Baden, near the city of San Francisco, and that while so engaged the alarm was given, the proprietors and others appeared upon the scene, and in the disturbance ensuing one Andrews, a boarder at the hotel, was killed by the defendant's confederate Raymond. The robbers escaped, and one Herve, a policeman, arrested Raymond a few hours later traveling upon the highway. At that time Raymond had in his possession a pistol which had been recently discharged, and possessed four empty chambers. Defendant's confederate had fired four shots from a pistol at the time of the murder. This pistol was one which defendant had secured from a shopkeeper some weeks prior to the killing. The witness, moreover, testified to a conversation had with Raymond at the time of his arrest as to his identity, from whence he came, where he was going, and his business, et cetera. The witness Burke, a policeman, who received Raymond from the hands of Herve at the jail, also testified to a conversation had with Raymond at that time. These

conversations were of the same general import. All of this evidence was admitted under objection of defendant, which objections were to the effect that it was hearsay; that defendant was not present at the time, and could not be bound by it; and that, even conceding the existence of a conspiracy between defendant and Raymond, at this time it was a thing of the past. To a large measure these objections of defendant to the admissibility of this evidence were eminently sound. (*People v. Oldham*, 111 Cal. 648; *People v. Opie*, 123 Cal. 294.) It was well to identify the pistol found upon Raymond as the pistol formerly purchased by the defendant Winters. Such evidence had a direct tendency to connect Winters with the commission of the offense; but declarations of Raymond made subsequent to the killing, not in the presence of the defendant, were the purest hearsay, and clearly inadmissible. Yet, upon a careful examination of those declarations, we find nothing therein stated which in any way was prejudicial to defendant. His name was not mentioned. Nothing whatever was said by Raymond which even by implication connected him with the crime. Indeed, Raymond said nothing in any way implicating himself. The error committed by the trial court, therefore, in the admission of this evidence was purely abstract, and furnished no ground for a new trial.

The remaining points urged by defendant possess no merit.

For the foregoing reasons the judgment and order are affirmed.

Harrison, J., McFarland, J., and Van Dyke, J., concurred.

HENSHAW, J. (dissenting).—I am of opinion that the court erred not only in the instruction which it gave upon the subject of alibi, but as well in the instruction asked by defendant which it refused to give. The defendant's whole case rested upon an alibi. If the law upon this subject was improperly placed before the jury the injury which thereby resulted to defendant certainly entitles him to a new trial.

The defendant asked the court to charge the jury as follows: "An alibi simply means that the accused was at another place at the time of the commission of the crime, and therefore could not have committed it; and I instruct you that this

defense is as legitimate and proper as any other defense. All the evidence bearing upon this defense should be carefully considered by you. If the testimony on this subject, considered with all the other evidence in the case, is sufficient to raise a doubt in your mind as to the guilt of the defendant, you should acquit him. The accused is not required to prove the defense of an alibi beyond a reasonable doubt, or even by a preponderance of evidence. It is sufficient if the evidence upon that point raises a doubt of his presence at the time and place of the commission of the crime charged, and, if it has done so, he is entitled to an acquittal. The attempt of the accused to prove an alibi does not shift the burden of proof from the state, but the state is bound to prove his presence beyond a reasonable doubt.

As applied to the facts in this case, the foregoing instruction is unimpeachable in its law, unless it be said that the failure to qualify "a doubt" by the adjective "reasonable" justified the court in refusing to give it. But I think the court was not justified, for the instructions are to be construed together, and elsewhere the court had in precise language told the jury "that the doubt which acquits a defendant on a trial on a charge of crime must be a reasonable doubt in the sense mentioned and no other." But if it shall be conceded that the court was justified in refusing to give the offered instruction for the indicated reason, it will be found even more difficult to uphold the instruction which the court actually did give. That instruction is as follows: "One of the defenses interposed by the defendant in this case is what is known in law as an alibi. An alibi in law simply means that the defendant was not there; or, to state it more definitely, a defendant who sets up an alibi shows such a state of facts surrounding his whereabouts as to the particular time the crime was committed as would make it practically improbable or impossible for him to have committed the offense charged. The court instructs you that such a defense is as proper and legitimate, if proved, as any other defense, and all the evidence bearing upon that point, if any, should be considered by you, and if, in view of all the evidence, you have any reasonable doubt as to whether the defendant was in some other place when the crime was committed, you should give the defend-

ant the benefit of the doubt. In other words, the defendant is not bound or required to prove an alibi beyond a reasonable doubt to entitle him to an acquittal. It is sufficient if the evidence upon that point, if any, raises a reasonable doubt in your minds of his presence at the time and place of the commission of the crime charged."

By this instruction the jury is first charged that a defendant who "sets up an alibi" is to show such a state of facts touching his whereabouts at the time of the commission of the crime as would make it "practically improbable or impossible" for him to have committed it. Such is not the law. One who is alibi is elsewhere than at the place of the crime at the time of its commission. A defendant who rests his defense upon an alibi is not required by his evidence to make it "practically improbable or impossible" for him to have committed the offense. It is necessary for him only to introduce evidence sufficient to create in the minds of the jurors a reasonable doubt whether or not he was at the scene of the crime at the time of its commission. The vice of the instruction lies in informing the jury that the defendant must prove that he was elsewhere so as to make it practically improbable or impossible for him to have committed the crime. This error is emphasized in the succeeding sentence, where the court informs the jury that the defense or alibi "is as proper and legitimate, if proved, as any other defense." In *People v. Roberts*, 122 Cal. 377, a new trial was ordered for an error of the court in instructing the jury upon the question of alibi that "when satisfactorily proven it is a good defense in law." Herein is a clear declaration that it is incumbent upon the defendant to prove his presence *alibi*. Again, the court declared that if the jury had "any reasonable doubt as to whether the defendant was in some other place when the crime was committed" the defendant should receive the benefit of the doubt, but here there is an entire misconception of the point to which the reasonable doubt should be directed. If a man charged with the commission of a crime in San Francisco should offer evidence under an alibi that he was in New York, the jury might entertain a reasonable doubt whether or not he was in New York, or more than that, they might positively believe that he was not in New York, but before they could

convict him they should be satisfied beyond a reasonable doubt that he was in San Francisco; or if—phrasing it otherwise—from all the evidence they did entertain a reasonable doubt whether or not he was in San Francisco at the time of the commission of the crime, the prosecution would have failed to establish their case with the certainty required, and the defendant would be entitled to an acquittal. This proposition is declared in the last sentence of instruction, but the instruction itself is conflicting and contradictory in its declarations, for the jury were as justified in believing from it that the defendant must prove that he was elsewhere as they were in believing that the law required only that the defendant's evidence should create in their minds a reasonable doubt. It needs no citation of authority to the point that contradictory and conflicting instructions upon the same proposition are prejudicially erroneous, and for this reason I think the defendant is entitled to a new trial.

Still further, the instruction "that the witness ascertained or appearing to be wilfully false in one part of his testimony as to the truth or falsity of a given proposition of fact is to be distrusted in other parts," is erroneous and misleading. It is not the "appearance" of giving false testimony; it is the belief that false testimony has been given which invokes and excites distrust and caution. Moreover, as given, the instruction omits the very important element that the willful, false testimony must be given upon a material matter. (*People v. Plyer*, 121 Cal. 160.)

Temple, J., and Beatty, C. J., concurred.

Rehearing denied.

[L. A. 490. Department One.—July 11, 1899.]

M. J. NOLAN et al., Respondents, v. M. B. McDUFFIE,
Appellant.

CHANGE OF PLACE OF TRIAL—NONRESIDENT DEFENDANT—AFFIDAVIT OF MERITS.—A nonresident defendant in an action to recover money, who, at the time of filing a demurrer to the complaint, filed a proper demand for the change of the place of trial to the county of his residence, and an affidavit of merits, showing the county of his

residence, and that he has "fully and fairly stated the case in this cause" to his attorneys, naming them, and that, after such statement, he is by each of them advised, and verily believes, that he has "a good and substantial defense on the merits to said action," makes a sufficient showing of merits to entitle him to the change demanded.

ID.—DEMURRER TO COMPLAINT—JURISDICTION OF COURT—INVALID ORDER.—Pending the hearing of a motion for the change of the place of trial by a nonresident defendant, and until it is passed upon, the court has no jurisdiction to hear and determine a demurrer to the complaint; and its order made in passing upon the same is a nullity. If the motion should be granted, the defendant is entitled to have the demurrer passed upon in the county of his residence.

APPEAL from an order of the Superior Court of Los Angeles County refusing to change the place of trial. Waldo M. York, Judge.

The facts are stated in the opinion.

C. A. Storke, Richards & Carrier, and Hatch, Miller & Brown, for Appellant.

W. R. Bacon, for Respondents.

CHIPMAN, C.—Action brought in Los Angeles county to recover commissions on sale of real property by plaintiffs as agents of defendant. Complaint was filed May 24, 1897.

The matter is here on appeal from an order denying defendant's motion for change of place of trial to Santa Barbara county. The proceedings as they appear from the transcript were as follows: On June 15, 1897, defendant made an affidavit of merits, and on the same day signed a demand directed to plaintiffs' attorneys that the place of trial be changed, and on the same day defendant's attorneys signed a notice directed to plaintiffs' attorneys stating that defendant would, on June 30, 1897, at 10 o'clock A. M., or as soon thereafter as counsel could be heard, move for a change of the place of trial, and that the motion would be heard "upon affidavits, copies of which are herewith served upon you, and upon the demand to change the place of trial and the papers on file in the case," et cetera. Defendant also, on the same day, served upon plaintiffs' attorneys a general demurrer to the complaint. These papers were all duly served on plaintiffs' counsel and filed. "On the twenty-eighth day of June, 1897, said demurrer came on regularly

to be heard on the law and motion calendar of said court, and the same, being called for argument, was answered ready by plaintiffs' counsel, the defendant not being present nor consenting to the hearing, and the court, having no knowledge of demand for change of place of trial, took up said demurrer and complaint and passed upon the same, sustaining said demurrer on said twenty-eighth day of June, 1897." It appears, also, that on the thirtieth day of June, 1897, the hearing of defendant's demand for change of place of trial "came on for hearing before said court, and the court, being of the opinion that the affidavits of merits was insufficient, granted defendant leave to amend the same, and the further hearing of the matter was continued until July 14, 1897, at which time the defendant filed the following amended affidavit of merits." Then follows this affidavit. It appears that the matter came on for hearing again on July 14, 1897, the day fixed by the court, when defendant's motion was denied on the grounds: 1. That the first affidavit of merits was insufficient, but in what respect is not shown; and 2. "That the demurrer heretofore filed in said cause by said defendant had been passed on by the court and sustained, and the application for a change of venue came too late." Defendant appeals from the order denying his motion. Respondents have filed no brief.

The affidavit first served stated as follows: "I reside in the county of Santa Barbara, state of California, and have so resided for more than five years last past. I further say that I have fully and fairly stated the case in this cause to (naming his attorneys), and after such statement I am by them and each of them advised and verily believe that I have a good and substantial defense on the merits to the said action." This affidavit was sufficient. (*Watkins v. Degner*, 63 Cal. 500; *Buell v. Dodge*, 63 Cal. 553.) The motion to change the place of trial was pending when the demurrer was passed upon, of which plaintiffs' counsel had notice. The absence of defendant's counsel on law day, when the demurrer was called, did not authorize the court to hear the demurrer. It was the duty of the court to hear and determine the motion before it could hear or determine the demurrer, and if the defendant had been found to be entitled

to have his motion granted, it was the right of defendant to have all other judicial action in the cause determined in the superior court of his own county. The court had no power to act upon the demurrer when it did (*Brady v. Times Mirror Co.*, 106 Cal. 56); and its order in that regard is a nullity.

I advise that the order denying defendant's motion be reversed.

Haynes, C., and Gray, C., concurred.

For the reasons given in the foregoing opinion the order denying defendant's motion is reversed.

Garoutte, J., Van Dyke, J., Harrison, J.

[S. F. No. 1154. Department Two.—July 11, 1899.]

COUNTY OF MENDOCINO, Respondent, v. J. R. JOHNSON et al., Appellants.

ACTION UPON BOND OF TAX-COLLECTOR—BURDEN OF PROOF—DEFAULT—

PAYMENT.—In an action against a tax-collector, on his official bond, to recover money collected and not paid over, the burden of proof for the plaintiff is sustained by showing that the tax-collector made default in failing to pay over, at the end of his term, moneys due the county; and the burden of proof is then on the defendants to show payment in full.

ID.—MODE OF PAYMENT—OFFER OF PROOF.—A payment to the tax-collector in a mode other than that expressly provided by law, will not exonerate the tax-collector or his bondsmen from an action by the county, unless it is proved that the county actually received the money, as distinguished from a mere deposit thereof with the treasurer. It is error to refuse an offer of proof that the county actually received the money, without proof first made of a compliance with the county government act by the tax-collector.

ID.—EVIDENCE—RECEIPTS TO TAX-COLLECTOR—TESTIMONY OF TREASURER—POSSIBLE AMENDMENT OF COMPLAINT.—It is error to exclude from evidence receipts given by the treasurer to the tax-collector, notwithstanding the evidence of the treasurer that a receipt for \$3,000 was fraudulently obtained, and that no such payment was in fact made; nor can the exclusion be excused as without injury, on the ground that the complaint might thereafter be amended by charging the tax-collector with what he showed by the receipts was paid above the amount alleged, and crediting him accordingly,

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still leaving the discrepancy of \$3,000 to be accounted for by the tax-collector.

APPEAL from a judgment of the Superior Court of Mendocino County and from an order denying a new trial. S. K. Dougherty, Judge.

The facts are stated in the opinion of the court.

R. McGarvey, and J. A. Cooper, for Appellants.

G. A. Sturtevant, J. Q. White, and Seawell & Pemberton, for Respondent.

HENSHAW, J.—This is an action brought by the county of Mendocino against J. R. Johnson, formerly its tax collector, and against the sureties upon his official bond, to recover the sum of \$3,000, moneys which it is alleged were collected by the tax collector and not accounted for by him in accordance with law. The cause was tried by a jury, which rendered a verdict for plaintiff in the sum of \$2,886.80. From the judgment which followed, and from the order denying defendants a new trial, they prosecute these appeals.

The complaint alleged that the defendant Johnson, as tax collector, on and after the first day of October, 1894, and before the seventh day of January, 1895 collected and received the sum of \$132,884.69, which he should have paid into the treasury of the county on or before the seventh day of January, 1895, "but that he did not pay prior to the seventh day of January, 1895, and has not since, of the moneys aforesaid, paid into the treasury of said county any other or greater sum than \$129,897.69.

Plaintiff's case rested mainly upon the testimony of the county treasurer, who said that upon the eighteenth day of December, Mr. Hardy, the deputy tax collector, had demanded of him a receipt for three thousand dollars, which he asserted he had paid into the treasury upon the eleventh day of December preceding, and Handy stated, according to the testimony of the county treasurer: "I came in and you were out of your office. I set it down on the floor. I went out and then went to my office to get more money, and forgot to come back." He testified further that Handy had

said that he obtained the money from Mr. Redemeyer's bank upon that day, and that Redemeyer had accompanied him when he left the money. The treasurer then asked Mr. Redemeyer if Handy had obtained the money from him, and Mr. Redemeyer answered, "Yes; I come with him." Under these circumstances the treasurer says he gave to the tax collector a receipt for \$3,000 more than was paid him. He also in January and in February made his sworn statements, as required by law, to the effect that this \$3,000 had actually been paid in and was in his possession. He further testified that his books showed that he had not received the \$3,000, and that in a subsequent conversation with Mr. Redemeyer (the banker with whom the tax collector seems to have deposited funds awaiting the time of his settlement with the treasurer) the latter informed him that he was mistaken when he said that he had accompanied Handy upon the eleventh; that Handy had drawn \$3,000 from the bank upon the eleventh, but that he had not accompanied Handy, and did not know what disposition Handy had made of the money.

1. The treasurer's examination was carried over the payments made to him by the tax collector in October, November, and December, 1894. He also swore that he had received nothing from the tax collector in the year 1895, up to and including the seventh day of January. Plaintiff, it will be remembered, charged the tax collector with the receipt of the sum \$132,000, and then alleged that of this sum he had not prior to the seventh day of January, and had not since that date, paid in any other or greater amount than the sum of \$129,000. The seventh day of January, 1895, was the date of the expiration of the tax collector's term. It was the date when by law he was required to make his settlement with the auditor and treasurer, but, if he failed to make his settlement upon that date, and did thereafter pay in full all of the moneys due from him to the county, the particular cause of action charged upon here would not lie. It was therefore essential for the plaintiff to aver defendant's default and failure to pay the money, and it was equally essential to follow the averment by proof, for issue was joined upon this question. But the averment was supported by sufficient evidence when it was shown that the tax col-

lector did not pay over all of the moneys due to the county upon the seventh day of January. The tax collector's default was then shown, and the burden of proof thereupon shifted to him to prove payment. The defense of payment may be made under the general issue, but the burden of proof is on the defendant. (*Frisch v. Caler*, 21 Cal. 71; *Wetmore v. San Francisco*, 44 Cal. 294; 2 Greenleaf on Evidence, Lewis' ed., sec. 516.) The verdict is therefore supported by the evidence.

2. When the deputy tax collector was called to the witness stand by the defendants in their effort to prove by him that he had actually paid the \$3,000 into the treasury, and that the treasurer's receipt therefor was not secured by fraud or misrepresentation, but was a valid recognition of the payment thus actually made, it was objected upon behalf of the plaintiff that the forms of payment prescribed by the County Government Act of 1891 were not followed, and that therefore the evidence was admissible. Those forms are established by section 115 of the County Government Act of 1891 (Stats. 1891, p. 323), and by section 71 of the same act (Stats. 1891, p. 316) It is made the duty of the auditor to examine and settle the accounts of all persons indebted to the county and holding moneys payable into the county treasury, and thereafter, upon the presentation and filing of the treasurer's receipt for such money, the auditor shall give to such person his discharge, and charge the treasurer with the amount named in the receipt. The treasurer is forbidden to receive and money into the treasury unless accompanied by the certificate of the auditor. After discussion the court ruled in the following language: "You want to show from this witness that he paid \$3,000 into that treasury on the eleventh of December without any authority on the part of the treasurer to receive it. The evident object of that provision is to throw a safeguard around the public funds. The objection is sustained to this. I have no doubt about it. I sustain the objection. I sustain the objection unless you say that you expect to follow the testimony up by showing that he has complied with section 115 of the County Government Act; that he first went to the auditor, and that the auditor examined the account, and that he settled it, and that he gave a certificate to the tax collector

authorizing him to deposit those three thousand dollars in the treasury." A payment to the treasurer in a mode other than that expressly provided by law would not exonerate the tax collector or his bondsmen from an action at the instance of the county, unless proof were made that the county actually received the money. In other words, the tax collector, or any other debtor of the county, is entitled to his acquittance from the county only when he has complied with the forms of law governing his payment into the treasury. If he sees fit to adopt an unauthorized mode of payment, he will be exonerated when he can make it appear, not only that he has paid the money, but that the county has received it. The mere deposit with the treasurer would not be proof sufficient thus to exonerate him. It would be in the nature of an individual deposit made at the party's private risk. But, nevertheless, if the tax collector could show that he had in fact paid the money to the treasurer, and that the county had obtained the benefit of it, then, notwithstanding the irregularity, no loss of funds would have resulted, and neither the tax collector nor his bondsmen could be properly charged in an action such as this for peculation or misappropriation. Therefore, although the offered evidence of the irregular payment would not have been sufficient of itself to exonerate the defendants. it was a step in that direction, and it was error upon the part of the court to refuse to accept the evidence without proof first made of a compliance with the terms of the County Government Act since that proof, from the loose methods seemingly employed by the treasurer and auditor, as well as the tax collector, could never be made at all, not only as to the \$3,000 here in question, but perhaps also as to the whole \$132,000 charged upon.

3. The court excluded evidence of four payments aggregating \$3,361.23 made by the tax collector to the treasurer, as shown by the treasurer's receipts. The respondent adopts the decision of the judge in denying the motion for a new trial, and therein it is conceded that the rejected evidence was competent evidence, which should have been admitted; but it is said that defendants were not injured by it, because "plaintiff by amendment would simply charge him with all that he showed was paid in as tax collector over the amount alleged, and credit him accordingly, still leaving the error

of \$3,000 on the eighteenth to be accounted for by him." If the evidence was competent, and it seems to have been, it should have been admitted, nor can its rejection be justified upon the ground that the plaintiff might thereafter have amended its complaint.

We think that what has been said renders unnecessary a consideration of other matters urged by appellants; and for the foregoing reasons the judgment and order are reversed and the cause remanded.

McFarland, J., and Temple, J., concurred.

Hearing in Bank denied.

Beatty C. J., dissented from the order denying a hearing in Bank.

[Crim. No. 517. Department One.—July 12, 1899.]

THE PEOPLE, Respondent, v. JOHN WATSON, Appellant.

CRIMINAL LAW—ASSAULT WITH INTENT TO MURDER—QUESTION OF FACT.—Upon the trial of a charge of assault with intent to commit murder, the question as to the intent with which the acts were done by the defendant, is one purely of fact, to be determined from all the circumstances of the case surrounding the assault.

ID.—ASSAULT WITH DEADLY WEAPON.—Under a charge of assault with intent to commit murder, the defendant may, if the evidence justifies it, be convicted pursuant to section 245 of the Penal Code, of an assault with a deadly weapon, or by means and force likely to produce great bodily injury.

ID.—IMPROPER OMISSION IN INSTRUCTION.—An instruction to the jury under a charge of assault with intent to commit murder, that the form of their verdict must be either not guilty, or guilty as charged, or guilty of an assault, is prejudicially erroneous in omitting the possibility of a conviction under section 245 of the Penal Code, where the evidence will justify such conviction. Such omission is the equivalent of a refusal to instruct that such conviction could be had under evidence justifying it.

APPEAL from a judgment of the Superior Court of Contra Costa County and from an order denying a new trial. Joseph P. Jones, Judge.

The facts are stated in the opinion of the court.

A. B. McKenzie, for Appellant.

Tirey L. Ford, Attorney General, and A. A. Moore, Jr., Deputy Attorney General, for Respondent.

GAROUTTE, J.—The defendant has been found guilty of an assault with intent to commit murder. He now claims that the evidence is insufficient to support the verdict.

There is evidence in the record which tends to show that the defendant Watson, when somewhat under the influence of liquor, seized a boy about fifteen years of age, tied him by the neck to his (Watson's) horse's tail, using the hair of the horse's tail for that purpose, then mounted his horse, and, with his pistol in his hand and threats to kill issuing from his mouth, rode about one-quarter of a mile, leading the boy. This journey was also interspersed by incidents such as defendant's firing his pistol. It further appears that this reckless deed was done by reason of the feeling of hatred held by defendant against the boy's elder brother. The question as to the intent with which these acts were done by defendant was a pure question of fact, to be determined from all the circumstances of the case; and from those circumstances the jury could well declare that the intent of defendant was to kill and murder this fifteen-year-old boy. It is said in *People v. Landman* 103 Cal. 580: "Of course, under these circumstances a person's intent cannot be proven by direct and positive evidence, yet it is none the less a question of fact to be proven like any other fact in the case, and all the circumstances surrounding the assault furnish the rule upon which its proper solution depends."

The court instructed the jury as follows: "The law provides that the jury may find the defendant guilty of any offense the commission of which is necessarily included in that with which he is charged, or of an attempt to commit the offense. 2. Under the information in this case the defendant can be convicted of either assault to murder, or of an assault, as the evidence may establish. 3. Gentlemen, the form of your verdict must be either: 1. We, the jury, find the defendant not guilty; or 2. We, the jury, find the defendant guilty as charged; or 3. We, the jury, find the defendant guilty of assault." Section 245 of the Penal Code provides: "Every person who commits an assault upon the

person of another with a deadly weapon or instrument, or by any means or force likely to produce great bodily injury, is punishable," et cetera. Under the evidence and the allegations of the information, it is clear that this defendant could well have been convicted of the crime defined by this section of the Penal Code. If the jury believed the defendant committed the acts indicated by the evidence, and also believed that there was no intent in his mind at the time to kill and murder the boy, they could well have found a verdict against him of making an assault by means and force likely to produce great bodily injury; yet, by the instructions of the court just quoted, the jury in effect were told that they could not find such a verdict. They were informed that the defendant could be convicted of an assault with intent to murder, or a simple assault. *Expressio unius est exclusio alterius*. This construction of these instructions is doubly emphasized when we find the court telling the jury that the verdict must be in one of the following forms; and upon examining those forms we find no form of verdict authorized under the section of the Penal Code already quoted.

This defendant's position upon the matter under discussion is much stronger than we find in those cases where the court fails to instruct at all upon the question. In some of those cases it has been held that the defendant should have asked for an instruction directed to the particular point. But in the present case the giving of the instruction authorizing the jury to find a verdict of guilty against the defendant under the aforesaid section of the Penal Code, providing the evidence justified it. In many cases we have held the judge justified in refusing instructions bearing upon lower grades of crime included in the charge laid by the information. These cases have arisen where, under the evidence, it was entirely plain no such crime was committed. In the present case we are unable to say that the evidence does not disclose the character of assault described in section 245.

The conclusion at which we have arrived is in no degree conflicting with the cases of *People v. Arnold*, 116 Cal. 687; *People v. Scott*, 93 Cal. 516; *People v. Barney*, 114 Cal. 558, and *People v. Guidice*, 73 Cal. 226. In all of those cases the

court gave no instruction whatever bearing upon the question, while in this case the court, for all the practical purposes of the trial, did give an instruction which was wrong in law. Again, in all those cases the evidence did not justify an instruction as to the particular grade of crime included in the information. Here the evidence does justify such an instruction. An additional reason is given in some of those cases showing why there was no error committed by the trial court. That reason is to the effect that no instruction by defendant was asked bearing upon the point involved. The trial judge of his own motion should inform the jury in every case as to all the particular crimes involved in the information which the evidence to any extent tends to support. Such is a most commendable practice; but here we are not concerned in that matter, for we have a case much stronger than one where the court did not act at all. It is not a case of nonaction, but erroneous action.

For the foregoing reasons the judgment and order are reversed, and the cause remanded for a new trial.

Harrison, J., and Van Dyke, J., concurred.

G. K. BAYLEY, Respondent, v. EMPLOYERS' LIABILITY ASSURANCE CORPORATION, Appellation.

INSURANCE—FALSE STATEMENT IN APPLICATION—KNOWLEDGE OF FACTS—WAIVER.—An insurance company issuing a policy with knowledge that statements made in the application are false, waives the right to object thereto.

ID.—APPLICATION FOR ACCIDENT INSURANCE—OMISSION BY AGENT OF KNOWN FACTS—PREVIOUS COMPENSATION.—Where an apparently false statement, made in an application for a policy of accident insurance, that the applicant had "never received compensation for any accident except as hereinafter stated," was caused by the omission of the agent who drew it, to state the "names of companies or associations, with amount of compensation," provided for in the form of application, and where the agent omitted to request a statement thereof from the applicant, and the facts that he had received previous indemnity for accidents from the same and other companies were known to the officers of the com-

pany, at the time of the application, objection to the falsity of the statement is waived, and it can not vitiate the policy.

- 1D.—UNKNOWN PAYMENT BY COMPANY KNOWN TO HAVE PAID INDEMNITY.—Where the officers of the insurance company knew that a previous large payment of indemnity for an accident had been made to the applicant by another company, the fact that another prior and smaller payment made to him by the same company was unknown to them, cannot affect their waiver of a true statement not requested of the applicant, as to the amount of compensation previously received.
- 1D.—WAIVER OF COMMUNICATION.—Neither party to a contract of insurance is bound to communicate information of matters of which the other waives communication, except in answer to inquiries.
- 1D.—CONSTRUCTION AGAINST INSURER.—Where the language of an "INDEMNITY."—The term "compensation," used in an application for an accident policy, requiring a statement of the amount of "compensation" previously received for accidents, is not to be construed in a popular sense, as including "indemnity," where the application and policy used the word "indemnity" with exclusive reference to weekly payments, to be made as indemnity during total disability to prosecute business, as the result of an accident, and never with reference to payments to be made for loss of life, limb, or eye.
- 1D.—CONSTRUCTION AGAINST INSURER.—Where the language of an application and policy, or of a policy, may be understood in more senses than one, it is to be construed most strongly against the insurer and in favor of the insured.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. A. A. Sanderson, Judge.

The facts are stated in the opinion of the court.

Van Ness & Redman, for Appellant.

The knowledge of defendant's agents, in respect to the truth or falsity of the statements made in the application, is immaterial. These statements were warranties (Civ. Code, secs. 2605, 2607, 2612), and, if untrue, there can be no recovery on the policy. (*Bartean v. Phoenix Mut. Life Ins. Co.*, 67 N. Y. 595; *Foot v. Aetna Life Ins. Co.*, 61 N. Y. 571; *Clemans v. Supreme Assembly etc.*, 131 N. Y. 485; *Jennings v. Chenango etc. Ins. Co.*, 2 Denio, 75.) There is no waiver of an untrue statement in regard to any fact not known to

the insurance company. (*Mutual Life Ins. Co. v. Nichols* (Tex. Civ. App., Jan. 17, 1894), 24 S. W. Rep. 910.) Contracts of insurance are to be construed according to the obvious meaning of their plain terms. (*McGlothter v. Provident Mut. Acc. Co.* 89 Fed. Rep. 685, 689.)

Chickering, Thomas & Gregory, for Respondents.

The application and policy having been prepared by the insurance company, should be construed most strongly against it. (Civ. Code, sec. 1654; *National Bank v. Union Ins. Co.*, 88 Cal. 497, 504; 22 Am. St. Rep. 324; *Rankin v. Amazon Ins. Co.*, 89 Cal. 203; 23 Am. St. Rep. 460; *Northey v. Bankers' Life Assn.*, 110 Cal. 547; *Dilleber v. Home Life Ins. Co.*, 69 N. Y. 256; *Burkhard v. Travelers' Ins. Co.*, 102 Pa. St. 262; 48 Am. Rep. 205; *Darrow v. Family Fund Soc.*, 116 N. Y. 537; 15 Am. St. Rep. 430; *Merrick v. Germania Fire Ins. Co.*, 54 Pa. St. 277; *Moulor v. Insurance Co.*, 111 U. S. 335.) Under this principle of construction compensation ought not to be construed as including "weekly indemnity." (7 Am. Law Rev. 587.) The meaning of those words in the contract is a question of law for the court. (*Thurston v. Burnett etc. Ins. Co.*, 98 Wis. 476.) A party to a contract of insurance is not bound to communicate information except in answer to inquiries, as to what the other party knows, or may be supposed to know, or of which he waives communication. (Civ. Code, sec. 2564.) Where the agents of the company had knowledge of the facts, an untrue statement is waived by the issuance of the policy. (*Dilleber v. Home Life Ins. Co.*, *supra*; *Forward v. Continental Ins. Co.*, 142 N. Y. 382; *Wood v. American Fire Ins. Co.*, 149 N. Y. 382; 52 Am. St. Rep. 733; *Dayton Ins. Co. v. Kelly*, 24 Ohio St. 345, 367; 15 Am. Rep. 612; *Waterbury v. Dakota etc. Ins. Co.*, 6 Dak. Ter. 468; *Van Schoick v. Niagara Fire Ins. Co.*, 68 N. Y. 434; *Dwelling-House Ins. Co. v. Brodie*, 52 Ark. 11; *Kruger v. Western etc. Ins. Co.*, 72 Cal. 91; 1 Am. St. Rep. 42; *Menk v. Home Ins. Co.*, 76 Cal. 53; 9 Am. St. Rep. 158; *Farnum v. Phoenix Ins. Co.*, 83 Cal. 246; 17 Am. St. Rep. 233.) The agent, in filling out the application, was the agent of the company, and not of the insured, and the company is bound by his action, omission, or mistake. (Joyce on Insurance, secs. 472, 487; *Russell v. Detroit Fire Ins. Co.*, 80 Mich. 407;

Union etc. Ins. Co. v. Wilkinson, 13 Wall. 222; *Davis v. Scottish Union*, 16 U. C. 176; *Dunbar v. Phoenix Ins. Co.*, 72 Wis. 492; *Whitney v. National Masonic Acc. Assn.*, 57 Minn. 472; *Phoenix Ins. Co. v. Raddin*, 120 U. S. 193; *Dilleber v. Home Life Ins. Co.*, *supra.*) The form of statement in the blank application is in the nature of a question; and does not become an untrue statement by being left unanswered. (*Brown v. Greenfield etc. Assn.*, 172 Mass. 498.)

VAN DYKE, J.—This is an action on a policy of accident insurance. The case was tried with a jury in the court below, and the verdict and judgment went for the plaintiff. The appeal is taken from the judgment and order denying a new trial. The assured, George B. Bayley, was killed by an accident, and the plaintiff, his widow, is the person in whose favor the policy ran.

There are two questions presented by the appellant: 1. That the assured represented, in his written application for the policy, that he had never proposed and been declined insurance by an accident insurance company, and that this was not true; 2. That he represented in said application that he had never received compensation for any accident, whereas he had in November, 1892, and also in the year 1886, received compensation on account of injuries he had sustained by previous accidents.

The first defense is eliminated from consideration here by the fact that the verdict of the jury was against the defendant, and the evidence bearing upon that defense was materially conflicting, and hence the verdict cannot be disturbed.

As to the second defense: In the application the fifteenth statement is as follows: "I have never received compensation for any accident except as herein stated (names of companies or associations, with amount of compensation)"; and there was no statement as to any compensation being received. It was shown, however, that the deceased had been paid for an accident in 1892, and also in 1886. But at the time of the application for the policy in question the defendant company and its officers knew that the assured, Bayley, had received payments in 1892, not only from its own company, but from three others. Mr. Okell, the general manager of the defend-

ant on this coast, testified: "I understood that other payments had been made to him. Q. Did you ever notify the company or any of the officers of your company, outside of your own agency here in San Francisco, that such payments had been made? A. No, it was not necessary"; and he further testified: "I knew in November, 1892, that Bayley had been paid by other companies weekly indemnity claims under accident policies held by him. I knew that other companies had paid him, but I did not remember the names of the companies . . . I knew Mr. Bayley in his lifetime. I had a conversation with him at or about the time that the policy issued in this case was applied for, in regard to the issuance of it. He came into my private office, and asked me if I would be willing to issue a twenty thousand dollar policy to him, and, knowing no reason why I should not, I said I would. I should think it was a few days before the issuance of the policy."

Mr. Thompson, the clerk and cashier of the general manager here, was asked: "I will ask you why it is that, if as cashier of the company at that time you knew that Bayley had received compensation from the Employers' Liability Company, you did not change or correct the statement 'I have never received compensation for any accident except as herein stated?' A. Seeing the loss had been paid by our own company, and the new application written in the same, there was no necessity of making that note on it as to the payment of our own loss."

In *Menk v. Home Ins. Co.*, 76 Cal. 53, 9 Am. St. Rep. 158, in the opinion in Bank it is said: "If the agent, knowing all the essential facts, made out the application for plaintiff, the company cannot take advantage of defective statements contained in it as not complying with the requirements of the company; nor would misstatements be fatal to the claim of plaintiff which the agent well knew to be false when he made out the application, received the money of the applicant, and issued the policy. The tendency of the decisions is plainly to hold all those conditions waived which to the knowledge of the agent would make the policy void as soon as delivered. Otherwise, the company would knowingly receive the money of the applicant without value returned, and the whole transaction would be a palpable fraud." (*Kruger v. Western Fire etc. Ins. Co.*, 72 Cal. 91; 1 Am. St. Rep. 42.)

In Bacon on Benefit Societies, volume 2, paragraph 427, it is said: "And if when the insurance company issues a policy it knows that certain answers in the application are falsely answered, it waives the right to object by such issue"; and the text is fully sustained by authorities.

But it is contended that, although the company may be deemed to have waived any mention of the payments made in 1892, of which it had knowledge, still it was necessary for Bayley to insert the payment made to the Travelers' Company in 1886. It will be seen from the form of the application, dates and different times compensation had been made were not required; only "names of companies or associations, with amount of compensation." But the defendant already knew that the Travelers' Company had paid Bayley, and therefore it was not necessary to again mention that company; and, as the dates of payment were not required, it would have been a literal compliance with the form to have added the small amount received in 1886 to the much larger sum paid in 1892, which latter, as already shown, was waived.

The weekly indemnities paid for loss of over nine weeks' time in 1892 were in consequence of severe injuries received by Bayley while descending from the summit of Mt. Tacoma or Rainier. The companies, other than the defendant, paying weekly indemnities for such loss of time, were the Pacific Mutual, Travelers, and Pacific Surety Company. Mr. Okell, general agent of defendant, having knowledge of these facts, says he knew of no reason why he should not insure Bayley for twenty thousand dollars. Bayley, it seems, had a personal interview with the general agent, and talked matters over with him about issuing the policy, and the company's clerk, Thompson, prepared the application, filling out the blanks, but omitting entirely any mention of prior payments or compensation, although he was well aware such had been made.

It is, therefore, reasonable to suppose Bayley considered the fifteenth paragraph as waived. Neither party to a contract of insurance is bound to communicate information of matters of which the other waives communication, except in answer to inquiries. (Civ. Code, sec. 2564.) This case is distinguishable from *Mutual Life Ins. Co. v. Nichols* (Tex. Civ. App. Jan. 17, 1894), 24 S. W. Rep. 910, relied upon by the appel-

lant. In that case the insured, in response to a question, answered "none other," which was incorrect. In this case there was no answer or response, and the reason why there was none is apparent.

The term "compensation" in the fifteenth subdivision of the application is, in this connection, in a measure ambiguous and uncertain as to its meaning. An inspection of the policy and application will show that when payment for loss of time is spoken of the word "indemnity" is used, and not used where payments are made for loss of life, limb, or eye. The policy pays for several different contingencies: 1. For death, the principal sum; 2. For the loss of two hands, two feet, one entire hand, or one entire foot, or permanent loss of sight of both eyes, principal sum; 3. For loss of one hand or one foot, one-half principal sum; 4. One hundred dollars per week so long as insured is wholly disabled from prosecuting any business pertaining to his occupation. In reference to the fourth payment the term "indemnity" is used entirely. Thus in the policy and indorsement thereon we find: "All sums paid as weekly indemnity . . . shall by so much diminish the said principal in case of claim for said principal. . . . If the insured is injured in any occupation or exposure classed by this corporation as more hazardous than herein given, his insurance and weekly indemnity shall be," et cetera. "No claim for weekly indemnity in excess of the money value of the insured time shall be valid. . . . The total risk taken by this corporation is ——— dollars for loss of life and ——— dollars weekly indemnity."

And the application contains the following: "The amount of insurance against accidental death or permanent total disablement hereby applied for is twenty thousand dollars. The amount of insurance against permanent partial disablement hereby applied for is \$10,000. The amount of weekly indemnity for total disabling injuries hereby applied for is \$100.00." Further down in the application we find statements as follows: "I have no other accident insurance covering weekly indemnity except as herein stated" (names of companies or associations, and amount of weekly indemnity in each), and there is inserted "Aetna, \$10,000." Then comes the subdivision under consideration, already quoted. It would appear from the foregoing that the word "indem-

nity" and not "compensation" refers to weekly payments. There seems also to be a distinction in the proof of claim, whether it is for a weekly indemnity, or loss, as of life, or limb, or sight. Although compensation in the popular sense may be broad enough to include indemnity, still, if the terms are used by the parties entering into the contract in a special or technical sense, they are to be so understood. (Civ. Code, sec. 1644.) "Where the language of a policy may be understood in more senses than one, it is to be construed most strongly against the insurer, because he frames it and is supposed to make it as potent as possible in his own favor; but, where there is no imperfection or ambiguity in the language, it must be construed like any other contract, according to the intention of the parties." (*Rankin v. Amazon Ins. Co.*, 89 Cal. 203; 23 Am. St. Rep. 460.) "It is a general rule that when a stipulation or exception to a policy of insurance emanating from the insurer is capable of two meanings, the one is to be adopted which is the most favorable to the insured; and when underwriters have left design doubtful by using obscure language, the construction to be adopted is the one most unfavorable to them." (*Merrick v. Germania Ins. Co.*, 54 Pa. St. 277.) "It (the policy of an accident company) insures either indemnity for injury by payment of a special weekly allowance during the time the insured is disabled by the injury, or compensation for death by payment of a fixed sum if the insured dies in consequence of the accident. These two forms of insurance are used separately, or in a joint policy covering both indemnity and compensation." (7 Am. Law Rev. 587.)

The defense urged in this case is purely technical, and does not go to the merits.

The judgment and order denying a new trial are affirmed.

Harrison, J., Garoutte, J., McFarland, J., and Henshaw, J., concurred.

Rehearing denied.

[S. F. No. 1123. Department One.—July 14, 1899.]

PATRICK HOLLAND, Respondent, v. J. J. McDADE, Appellant, and E. J. CURRY, Codefendant.

APPEAL—ORDER DENYING NEW TRIAL—STAY OF EXECUTION—CASE AFFIRMED.—Upon an appeal from an order denying a new trial in an action for the recovery of money, the reversal of the order would necessarily set aside the judgment; and the giving of a bond in double the amount of the judgment operates as a stay of execution pending such appeal. *Fulton v. Hanna*, 40 Cal. 278, affirmed.

PLEADING—DEMURRER FOR UNCERTAINTY—REVIEW UPON APPEAL—ERROR WITHOUT PREJUDICE.—Error in the overruling of a demurrer to a complaint for uncertainty is not ground for reversal of a judgment, where no substantial injury appears; and where it appears that the rights of the defendant could have been fully protected at the trial by objection to evidence, notwithstanding the uncertainty of the complaint any error in the overruling of a demurrer for such uncertainty is without prejudice.

ID.—ACTION AGAINST SHERIFF—LEVY UNDER EXECUTION—STAY BOND—UNCERTAINTY OF COMPLAINT.—OBJECTION TO EVIDENCE.—In an action to recover damages for the refusal of a sheriff to release property levied upon under execution, where a stay bond was given upon appeal, error in overruling a demurrer to the complaint for uncertainty as to whether the damages claimed included damages resulting from the levy prior to the stay bond, is without prejudice, as it appears that the defendant might have protected his rights by objecting to the introduction of any evidence as to such prior damages.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. John Hunt, Judge.

The facts are stated in the opinion of the court.

Sullivan & Sullivan, for Appellant.

T. J. Crowley, and T. M. Osmont, for Respondent.

GAROUTTE, J.—This appeal is from the judgment, without a bill of exceptions, and the questions involved arise upon the face of the complaint.

The action is one against McDade, former sheriff of the city and county of San Francisco, for damages claimed to have resulted from his refusal to release certain property of plaintiff from execution, and also in publishing notice of

sale thereof under said execution. This execution was issued and levied under a money judgment in the case of *Curry v. Holland*. Holland's motion for a new trial in that case was denied, whereupon he appealed from the order denying the motion, and without appealing from the judgment gave a bond upon appeal in double the amount of the judgment for the purpose of staying its execution. The acts of the sheriff of which complaint is made in the present action were done after this purported stay bond was filed.

The important question presented by the appeal is: May an appellant upon appeal from an order denying his motion for a new trial give a bond in double the amount of the judgment and thereby stay its execution? If he may do so, authority for it must be found in section 942 of the Code of Civil Procedure, where it is provided: "If the appeal be from a judgment or order directing the payment of money, it does not stay the execution of the judgment or order unless a written undertaking be executed on the part of the appellant, by two or more sureties, to the effect that they are bound in double the amount named in the judgment or order." By inspection of the foregoing provision of the law it would seem that very liberal rules of construction must be invoked in order to justify the giving of a stay bond upon an appeal from an order denying a motion for a new trial. At the same time, it was so directly decided in the comparatively early case of *Fulton v. Hanna*, 40 Cal. 278. The conclusion there declared is based upon the following reason: "Although an appeal from an order denying a motion for a new trial is in a different and distinct line of proceeding from a direct appeal from a judgment, still a reversal on appeal from the order denying a motion for a new trial, and remanding the cause for retrial, as effectually vacates the judgment as upon a direct appeal therefrom." The reason here given has force, and the only answer that can be made to its conclusiveness, if there be an answer, is that the statute does not expressly so provide. Yet the rule laid down in the case cited is a most wholesome one; for an appeal from a judgment which is absolutely beyond attack is an idle and useless proceeding. Indeed, such an appeal would be frivolous and render the appellant liable in damages for bringing that character of

appeal before this court. It serves but to encumber the records and gives unnecessary labor to both lawyers and court. It certainly should not be held that an appeal of that character must be taken for the single purpose of securing an opportunity to file a stay bond, unless the statute clearly forbids any other course.

The question here involved has never been squarely presented since the case of *Fulton v. Hanna supra*. In *McCallion v. Savings etc. Soc.*, 83 Cal. 572, that case is cited, and the court said: "It is not doubted that a stay undertaking can be so drawn as to effect a stay on appeal from an order denying a new trial." In *Tompkins v. Montgomery*, 116 Cal. 123, citing *Fulton v. Hanna, supra*, it was said: "The right of the appellant to have the execution stayed pending the appeal from an order denying a new trial is not impaired by the fact that the appeal from the judgment is dismissed." And in that case this court allowed a stay bond to be filed here upon an appeal from an order denying a motion for a new trial. *Tompkins v. Montgomery, supra*, seems to be in full support of *Fulton v. Hanna, supra*; for if the stay bond may be filed in this court upon an appeal from such an order, it must be allowable in the trial court. In that case, there was an appeal from the judgment as well as from the order denying the motion for a new trial, and an unsuccessful attempt was made to give a stay bond in the trial court. The appeal from the judgment was dismissed by this court. Hence there was nothing before this court in the form of an appeal from the judgment at the time the stay bond was allowed to be filed.

There is some general language found in the case of *Carit v. Williams*, 67 Cal. 580, opposed to the doctrine declared in *Fulton v. Hanna, supra*; but in their facts the two cases are widely dissimilar. In that case the appeal was from an order made after judgment, refusing to set aside an execution. This execution may have been set aside for a hundred different causes occurring supplemental to the judgment. Hence a reversal of that order would not necessarily set aside the judgment; yet such would be the inevitable effect upon a judgment, of a reversal of the order, in the case of an appeal from the order denying the motion for a new trial. For this reason *Carit v. Williams, supra*, clearly falls without the

doctrine laid down in *Fulton v. Hanna, supra*. Again, in *Reay v. Butler*, 118 Cal. 113, a case cited by appellant, it was held that a stay bond could not be given upon an appeal from an order refusing to strike out a cost bill. In that case the order was not one made directing the payment of money. Neither could the reversal of the order upon appeal have resulted in vacating and setting aside the judgment. It must be observed, therefore, that these cases are not opposed to *Fulton v. Hanna, supra*.

Upon broad principles of construction it has been decided that a single appeal bond of three hundred dollars is sufficient upon an appeal from the judgment, and from the order denying the motion for a new trial. This shows in what close connection the two appeals are recognized and treated by the court. An appeal from the order denying the motion for a new trial is neither more nor less than a direct attack upon the judgment. This is its sole aim and purpose. The question here presented is purely one of practice. In this instance certainty of the true rule is more to be desired than the particular nature of the rule established. We are fully satisfied that a most wholesome construction of the statute is found in *Fulton v. Hanna, supra*; and, in view of the fact that the construction there declared has stood so long without successful assault either by the courts or the legislature, we feel that adherence should still be given to it.

We are not prepared to say that substantial error was committed in overruling the defendant's demurrer to the complaint for uncertainty. Conceding the ruling erroneous, still it is not every erroneous ruling of the trial court in this regard that demands a reversal of the judgment. Substantial injury to defendant must have resulted from the action of the court. If this complaint be uncertain as to whether or not some of the alleged damage done by McDade was done before the stay bond was filed, under objection, evidence offered tending to indicate that fact would not have been admitted. Again, the instructions to the jury could readily have protected defendant's right in this regard. There being no bill of exceptions before us, we know nothing that occurred at the trial pertaining to this matter. But defendant had abundant opportunity at that time to protect himself against any dis-

astrous results which might have been occasioned by the uncertainty of the pleading. It is said in *Alexander v. Central Lumber etc. Co.*, 104 Cal. 536: "It is not in all cases where error has been committed by trial courts in overruling demurrers to complaints upon the grounds of ambiguity or uncertainty that this court will order a reversal of the judgment, based upon the trial of the issues made by the complaint and answer. The same rule applies to errors of this character as is invoked as to all other errors of the court. It must not be mere abstract error, but it must be prejudicial and injurious error in order to avail appellant, for otherwise he has no cause of complaint." We are satisfied there is no prejudicial error disclosed upon this point.

We find no merit in the plea of the statute of limitations.

For the foregoing reasons the judgment is affirmed.

Harrison, J., and Van Dyke, J., concurred.

[Sac. No. 656. Department One.—July 14, 1899.]

LEOPOLD SELNA, Individually, and as Administrator, et cetera, Appellant, v. PEARL E. SELNA et al., Respondents.

VENDOR'S LIEN—CODE PROVISIONS—EQUITY RULE.—The provisions of sections 3046, 3047, and 3048, of the Civil Code, are intended to make more clear and definite the equity rule as to vendor's liens, by which a vendor who has made a deed of grant to the purchaser has an equitable lien upon the granted premises for the amount of the unpaid purchase money, if it is unsecured otherwise than by the personal obligation of the buyer.

1D.—FOUNDATION AND ORIGIN OF DOCTRINE.—The foundation of the doctrine as to the lien of a vendor is in the general principles of equity and moral justice, that a person who has acquired the estate of another, ought not in conscience, as between them, to be allowed to keep it and not pay the full consideration money; and the origin of the doctrine appears to be the principles of the Roman law, imported into the equity jurisprudence of England.

1D.—RIGHTS AND LIABILITIES OF PERSONAL REPRESENTATIVES.—The lien of a vendor is not extinguished by his death, nor by the death of the grantee. It passes to the personal representatives of the deceased vendor, and may be enforced against the estate of the deceased grantee, or those into whose hands it may come.

- ID.—WAIVER OF LIEN—INTENTION—INEQUITY.**—In order to constitute a waiver of the lien of the vendor, his intention must be evinced, expressly or impliedly, to dispense with the lien; or he must so place his rights in relation to the land sold as to make it inequitable to sustain the right thereto.
- ID.—BURDEN OF PROOF AS TO WAIVER—PRESUMPTION.**—The burden of proof is upon the purchaser to establish that in the particular case the lien has been intentionally displaced or waived; and if, under all the circumstances, it remains in doubt whether the lien has been waived, it will not be presumed to have been waived, but will be sustained and enforced.
- ID.—PRESENTATION OF CLAIM AGAINST ESTATE—OMISSION TO STATE CLAIM OF LIEN.**—There is no statutory provision requiring that a claim presented by the vendor against the estate of the deceased grantee for the amount of the unpaid purchase money, shall state that the vendor claims a lien against the granted premises for the amount of such claim; and though it is better that such statement should be made, yet the omission to make it does not constitute a waiver of the lien, or make it inequitable to enforce it.
- ID.—ALLOWANCE OF CLAIM—QUALIFIED JUDGMENT—LIEN NOT CREATED.**—The allowance of a claim against the estate of a deceased person is only a qualified judgment, and does not create any lien upon the real or personal estate of the decedent, which can waive a vendor's lien. It only maintains the same general rights which the vendor had, before the death of his grantee, to look not only to the land of the grantee, but to the property owned by him, to determine the collectibility of the note.
- ID.—EFFECT OF JUDGMENT AT LAW.**—It seems that the recovery of a judgment at law for the unpaid purchase money, so far as not enforced by execution, does not preclude the vendor from enforcing his equitable lien against the granted land, for the unpaid portion of the purchase money.

APPEAL from a judgment of the Superior Court of San Joaquin County. Edward I. Jones, Judge.

The facts are stated in the opinion.

Louttit & Middlecoff, for Appellant.

Budd & Thompson, for Respondents.

COOPER, C.—Action to recover four hundred and twenty dollars and have same declared a lien upon certain real estate. Judgment for defendants. Appeal from the judgment on the judgment roll. It appears from the findings that on August 30, 1894, the plaintiff sold and conveyed by deed of grant

the premises described in the complaint to one Patrick Selna, for the sum of fifteen hundred dollars, all of which amount had been paid prior to August 2, 1897, except the sum of five hundred dollars, and on said last-named date said Patrick Selna executed and delivered to plaintiff his promissory note for said balance of five hundred dollars. On this note there was paid on the twenty-seventh day of December, 1897, the sum of eighty dollars. On January 15, 1898, the said Patrick Selna died intestate, being at the time of his death the owner of the said real estate, leaving a balance of four hundred and twenty dollars due and owing to plaintiff on said promissory note, and leaving surviving him his wife, Pearl E. Selna, one of the defendants herein. February 4, 1898, the plaintiff was duly appointed administrator of the estate of said Patrick Selna, deceased, qualified, and letters of administration were issued to him. February 19, 1898, the plaintiff, as such administrator, published a notice to creditors, as required by statute, and on the fifteenth day of April, 1898, prepared his claim against said estate for the balance of four hundred and twenty dollars so due upon said note. The claim contained a copy of the said promissory note, but made no reference to any claim of lien, and was properly verified as required by statute. The claim as so presented was allowed and approved April 15, 1898, by the judge of the superior court in which the estate was pending, and was on said last-named date filed with the clerk of said court. July 15, 1898, the said superior court, by decree duly made and entered, set apart the said premises to defendant Pearl E. Selna as a homestead. The complaint was filed August 3, 1898, all recourse against any other property of the estate is expressly waived, and it is sought to have it adjudged that the four hundred and twenty dollars balance of the purchase price of said premises is a lien thereon, and that the premises be sold to satisfy said lien. The learned judge of the court below found all the facts as herein stated, but as a conclusion of law found that the plaintiff, by so having the said claim allowed and filed, waived all right to have the same declared to be secured by a vendor's lien. The sole and only question to be determined upon this appeal is whether or not the plaintiff, by so having his claim allowed and filed, waived his right to a vendor's

lien upon the property described in the complaint. There is no proof or finding of any act or word of plaintiff tending to show an intention to waive the lien except the act of having his claim so allowed and filed. As to vendor's liens, the provisions of our Civil Code are as follows:

"Sec. 3046. One who sells real property has a vendor's lien thereon, independent of possession, for so much of the price as remains unpaid and unsecured otherwise than by the personal obligation of the buyer."

"Sec. 3047. Where a buyer of real property gives to the seller a written contract for payment of all or part of the price, an absolute transfer of such contract by the seller waives his lien to the extent of the sum payable under the contract; but a transfer of such contract in trust to pay debts, and return the surplus, is not a waiver of the lien."

"Sec. 3048. The liens defined in sections 3046 and 3050 are valid against every one claiming under the debtor, except a purchaser or encumbrancer in good faith and for value."

It is evident that the statute gives to the seller of real estate a lien for so much of the purchase price as remains unpaid and unsecured otherwise than by the personal obligation of the buyer. The court in this case found that the four hundred and twenty dollars, part of the purchase price, remains unpaid and unsecured except by the note and the filing thereof as a claim. The rule of our Civil Code was intended to make more clear and definite the equity rule as to vendor's liens.

The principle upon which this lien has been established by courts of equity is that a person who has gotten the estate of another ought not in conscience, as between them, to be allowed to keep it and not pay the full consideration money. The true origin of the doctrine may with high probability be ascribed to the Roman law, from which it was imported into the equity jurisprudence of England. (2 Sugden on Vendors, 324, and note 2.) Judge Redfield, in the case of *Manley v. Slason*, 21 Vt. 275, 52 Am. Dec. 60, said: "There can be no doubt that the existence of such a lien is among the settled doctrines of the English chancery . . . its foundation exists in the general principles of equity, and moral justice, by which the seller is entitled to hold upon the estate until he gets the price."

The lien of the vendor is of so high a nature that it is not extinguished by his death, but passes to his representatives. Nor is it discharged by death of the grantee, but may be enforced against his estate or those into whose hands the property may come. (2 Warvelle on Vendors, 700, 701.)

The question as to what constitutes a waiver of this lien of the vendor has been a source of much controversy. The authorities generally agree that to constitute a waiver of the lien there must be some act or omission by the vendor showing an intention on his part to waive the lien. The rule is thus stated in Overton on the Law of Liens: "Sec. 622. To constitute a waiver of the right to the lien there must be some act or omission by the vendor which actually or impliedly evinces an intention on his part to dispense with the security given him in equity. Therefore, in question of this character the point to determine will be, has the vendor, by such or such an act or omission, so placed his rights in relation to the lands sold or to the vendee that it would be inequitable to sustain this right in his favor? Or has his act been such that it shows a determination not to rely upon his lien?"

And to the same effect are the following authorities: 2 Jones on liens, sec. 1073; 2 Warvelle on Vendors, 712; note to *Mackreth v. Symmons*, 1 White & Tudors' Lead. Cas. Eq., pt. 1, p. 482-84: Applying the rule thus laid down, was the act of plaintiff in filing his claim such an act as would make it inequitable to allow him to sustain his lien, or such that it showed a determination on his part not to rely upon it? We think that the mere fact of making out and filing the claim did not show any determination or intention of plaintiff not to rely upon his lien; neither do we think such fact in any way would make it inequitable to now allow such lien. No one has been injured by any delay, act, or conduct of plaintiff. The filing of the claim did not deceive anyone, and the right of plaintiff to a lien is such that we cannot presume from any trivial circumstance that such right was waived. The plaintiff could not have maintained any action upon the note without first presenting his claim. (Code Civ. Proc., secs. 1500, 1510.) The claim was not secured by any mortgage or recorded lien, and, therefore, it was not necessary for it to contain any statement as to

the claim of lien. (Code Civ. Proc., sec. 1497.) It might have stated the claim of lien and that the claimant did not intend to waive it, and it would, perhaps, have been the better practice if it had so stated, but as the statute does not expressly require such statement, we think it would be harsh rule to hold that the absence thereof of itself waived the lien.

The burden of proof is on the purchaser to establish that in the particular case the lien has been intentionally displaced or waived. If, under all the circumstances, it remains in doubt, the lien attaches. (2 Story's Equity Jurisprudence, sec. 1224; *Wilson v. Lyon*, 51 Ill. 166; *Truebody v. Jacobson*, 2 Cal. 286; 2 Warvelle on Vendors, 713.) And so long as the debt exists courts will not presume that the lien has been waived, except upon clear and convincing testimony. (2 Warvelle on Vendors, 712-14; *Cole v. Withers*, 33 Gratt. 195.)

Defendant in support of her claim that the lien was waived relies upon *Fitzell v. Leaky*, 72 Cal. 484; *Avery v. Clark*, 87 Cal. 623; 22 Am. St. Rep. 272, and *Holt Mfg. Co. v. Ewing*, 109 Cal. 355. In *Fitzell v. Leaky*, *supra*, the action was brought to enjoin the defendant as sheriff from selling one-fourth of a water ditch claimed by plaintiff to be appurtenant to and a part of his homestead. The question discussed was whether or not the interest in the water ditch was a part of the homestead. There was no issue or determination of any issue as to a vendor's lien, but the court in the opinion used this language: "If Kelly ever had the right to have a vendor's lien adjudicated and declared by a court of equity, he has never commenced proceedings to that end, but has waived his lien by taking a general judgment, which, if docketed, was a lien on all the real property of the plaintiff." This remark by the learned judge who wrote the opinion was *obiter dictum*, but if stated the law correctly it has no application to the facts of this case. Here plaintiff had no judgment docketed nor any judgment which was a lien upon any property. His allowed claim was in certain respects in the nature of a judgment, but only a qualified judgment. It was not a lien upon any real or personal estate. It was not conclusive upon the heirs of the estate. (Code Civ. Proc., sec. 1636; *Wiehe v. Statham*, 67 Cal. 84; *Estate of Hill*, 62 Cal. 186.) Before the death of Patrick

Selna plaintiff had the right to look not only to the land, but to the property owned by him, in determining whether or not the note could be collected. After his death and the allowance of the claim he had a right to look to the same property, diminished by the right given the administrator to take a certain portion of it for expenses of administration, for the payment of preferred claims and such family allowance as the court might make for the support of the family of deceased. The filing of the claim did not give plaintiff any security upon any specific property nor any lien upon any property. It is stated by the authorities that if the vendor recover a judgment at law and has not exhausted his remedy by execution, he is not precluded thereby from proceeding to enforce his equitable lien for the purchase money. (*Walker v. Sedgwick*, 8 Cal. 404; *Overton on the Law of Liens*, 691; *McAlpin v. Burnett*, 19 Tex. 497; *Dubois v. Hull*, 43 Barb. 26; 2 *Warvelle on Vendors*, 719; *Palmer v. Harris*, 100 Ill. 276; *Chapman v. Lee*, 64 Ala. 483.)

In *Avery v. Clark*, *supra*, it appeared that one Robbins, the grantor, conveyed to Mrs. Humeston a tract of land and took as part payment the promissary notes of herself and husband, secured by their mortgage upon the land conveyed. It was held that the unpaid price of the land did not thereafter "remain unsecured otherwise than by the personal obligation of the buyer."

The case of *Holt Mfg. Co. v. Ewing*, *supra*, was replevin for a harvester sold and delivered to one Ewing in his lifetime. Under the contract of sale the title to the harvester was to be and remain in plaintiff until the full payment of the price had been made. Certainly promissory notes had been given to plaintiff by said Ewing, and upon the last one there remained a small balance due when the maker thereof died. The plaintiff duly made out and presented its claim against the estate of said Ewing for the balance due upon this note. The claim was allowed and placed on file. This court held that the sale was a conditional one and that upon the default of the purchaser the plaintiff had either of two remedies. He could retake the property or recover it by action, or he could regard the sale as an absolute one and recover upon the notes, but that the two remedies being inconsistent he could not pursue both. The principle upon

which the case was decided has no application to the present case.

We advise that the judgment be reversed and the cause remanded, with directions to the court below to enter judgment upon the findings in favor of plaintiff and in accordance with the views herein expressed.

Gray, C., and Britt, C., concurred.

For the reasons given in the foregoing opinion the judgment is reversed and the cause remanded, with directions to the court below to enter judgment upon the findings in favor of plaintiff and in accordance with the views herein expressed.

Garoutte, J., Van Dyke, J., Harrison, J.

[S. F. No. 1121. Department Two.—July 14, 1899.]

HENRY C. BURK et al., Respondents, v. ARCATA & MAD RIVER RAILROAD COMPANY, Appellant.

ACTION FOR DEATH—ADULT COLLATERAL HEIRS—FAILURE OF PROOF—

NOMINAL DAMAGES—INSTRUCTION.—In an action for a death brought by the adult collateral heirs of the deceased, the mere fact that they are such heirs does not tend to show pecuniary damage; and in the absence of other proof tending to show actual damages, or, at least, probable loss, resulting to them from the death, the jury should be instructed that their recovery must be limited to nominal damages.

ID.—SPECULATIVE POSSIBILITIES OF BENEFITS.—Mere speculative or conjectural possibilities of benefits to the parties complaining are not a proper basis for an estimate of damages resulting from a death.

APPEAL from a judgment of the Superior Court of Humboldt County and from an order denying a new trial. E. W. Wilson, Judge.

The facts are stated in the opinion of the court.

Chamberlain & Wheeler, Buck & Cutler, and S. M. Buck, for Appellant.

Frank McGowan, Brousse Brizzard, and Mahan & Mahan,
for Respondents.

TEMPLE, J.—This is an appeal from a judgment and from an order refusing a new trial. The suit was brought by a sister and two brothers of George W. Burk to recover damages for his death, which was caused by the negligence of the defendant. The plaintiffs are all adults, and the deceased at the time of his death was thirty-four years old. It was admitted that he was in good health, a competent and reliable locomotive engineer, in the receipt of monthly wages in the sum of seventy-five dollars, and was well inured to his work. He had never been married and was boarding with one of his brothers immediately before the accident, and was on friendly terms with plaintiffs.

Plaintiffs recovered judgment for fifteen hundred dollars. The defendant contends that there was no evidence which tended to show any damage whatever, and therefore plaintiffs were entitled to nominal damages only. An instruction to that effect was asked and refused. This presents the only question on the motion for a new trial or on the appeal.

The instructions actually given to the jury by the court on the subject of damages are not complained of. Instruction 27 contains a full and correct statement of the general rule. It is as follows: "I charge you that damages can only be given for the actual pecuniary injury or loss suffered by the parties complaining; in other words, in a case such as the present, should you find that plaintiffs are entitled to damages, then damages can only be given for the pecuniary injury or loss the plaintiffs have sustained, or will sustain, by the death of said George W. Burk. And in this regard I charge you that no damages can be given to plaintiffs for the grief or sorrow or pain of mind, or injury to their feelings, or for loss of society of deceased, or for his pain or suffering, or for the loss of his comfort or protection. The law simply measures the injury complained of by the loss it has caused or will cause in dollars and cents. In passing upon this question you are not allowed to speculate or indulge in presumptions not warranted by the evidence; but you must determine this question solely by the evidence introduced before you. If you are not able to determine from the

evidence that the plaintiffs have suffered a pecuniary injury or loss in the death of George W. Burk, it becomes your duty to return a verdict for defendant. And in passing upon the extent of the pecuniary injury or loss sustained by the plaintiffs, you must be governed solely by the evidence introduced; you must not indulge in conjectures, or speculations not supported by the evidence."

The defendant requested an instruction as follows: which was refused: "There is no evidence in the case tending to prove whether George W. Burk was in the habit of saving his wages, or whether he was in the habit of spending all his earnings, or whether he ever contributed toward the support of or to the plaintiffs, or either of them, or whether plaintiffs ever had any reasonable expectation of receiving aid from him. Therefore, if you find a verdict in favor of the plaintiffs, you must limit the amount of damages to a merely nominal sum."

The condition of the evidence was undoubtedly as recited in the proposed instruction, there being no evidence whatever upon the subject except as I have stated.

Respondent contends for the rule laid down in *Illinois Cent. R. R. Co. v. Barron*, 5 Wall. 106, where it was said that the relatives for whose benefit the suit was brought need not have had a legal claim upon the deceased, and that they can recover what it is reasonably probable they would have received from the deceased had he not been killed. But this, if admitted, still leaves the question unanswered. Does the evidence show that it was reasonably probable that they would have received anything from deceased if he had not been killed?

Ordinarily, it would be admitted these mere possibilities of benefits—for they are really nothing more than that—would not be a proper basis for the estimate of damages. It is recognized that there may be no evidence of actual damage and that the loss is problematical. It is contended that the legislature intended that some damage should be allowed, and in some states it is left to the jury to estimate the pecuniary value of the life upon vague surmise of possible advantage.

The statutes in the different states, though varying greatly, follow generally Lord Campbell's act, 9 & 10 Vict., c. 95. In

that it was recited that no right of action existed at common law for such damages. It was then a new right of action. It could not be a continuation of the right which the injured man had for the injury, for the loss to his heirs did not accrue until he died. Under our statute, the injured person might survive long enough to sue and recover damages or to settle with the wrongdoer, and then by his death a new cause of action would accrue to his heirs. True, it has been held differently in some states, which have what are called survival statutes. Here it has been ruled, as the fact evidently is, that the statutes create an entirely new cause of action. (*Munro v. Pacific etc. Co.*, 84 Cal. 515; 18 Am. St. Rep. 248.) And the jury were instructed in this case that damages can only be given "for the actual pecuniary injury or loss suffered by the parties complaining."

It has been said that Lord Campbell's act was intended to be penal. It had been found that persons causing death by negligence could not be convicted of manslaughter, and it was thought that in the interests of the public some punishment should be meted out to them. Had it been expressly made punitive, much trouble would have been avoided. The English courts held that only pecuniary loss could be recovered, and that a plaintiff must show actual loss or he has no cause of action. In this country, the ruling is nearly unanimous that the statute gives a cause of action, and, if no damages are proven, nominal damages only can be recovered.

Unless the mere fact that plaintiffs were at the time of his death the heirs of deceased tends to show pecuniary damage, they have shown none.

In *Illinois Cent. R. R. Co. v. Barron*, *supra*, it is said that it is presumed that the property of the deceased would have gone at his death as directed by law, and if he had survived he would have added something to his estate which his next of kin would have inherited, and the equivalent as estimated by the jury may be given his representative. This ruling has been followed often in the federal courts and by many state courts. The decision is criticised in *Baltimore etc. R. R. Co. v. Galway*, 6 App. Cas. (D. C.) 143. It is shown to be opposed to reason and the trend of the decisions and a misconception of the Illinois statute as afterward construed in *Chi-*

cago etc. R. R. Co. v. Swett, 45 Ill. 197; 92 Am. Dec. 206, by the supreme court of Illinois.

In these cases the jury have been permitted to indulge in mere conjecture, that they may find some damage under the statute. It is said the fact that a right to sue is given implies that damages may be recovered, although no rights of plaintiffs have been violated. Confessedly, plaintiffs had no legal claim on deceased for anything, and he owed no duty to them to accumulate an estate and leave it to them. Let us consider upon what a sea of uncertainty the jury must embark: 1. Would the deceased have had the health to work and accumulate, and would he have done so? He never had saved anything, and it does not appear that he could have done so; 2. Might he not have married and have had children of his own who would inherit? 3. Might he not by will have disinherited the plaintiffs; and 4. Might he not have outlived them?

The majority of men die without much property. Whether the deceased would have succeeded in accumulating, and, if he had been successful, would have left it to plaintiffs, is matter of pure speculation. Such a guess as to probabilities, is not, according to settled rules and maxims of the law, proper ground for the award of damages. I see no reason why this class of cases should constitute an exception. If it was intended to punish for wrongdoing, the law could be understood. But the courts hold, and it is made the law of this case by the instructions, which were not excepted to, that plaintiffs can recover only the number of dollars they have lost by the death of George W. Burk. Unless they lost a probable increase to their inheritance from their brother, I see no evidence which tends to prove that they lost anything.

This question was not at issue and was not discussed in *Harrison v. Sutter Street R. R. Co.*, 116 Cal. 156. The rule was conceded.

The suit could have been maintained by the administrator for the benefit of the estate. The heirs would not take the money as heirs—that is, they would not take by succession, but as the beneficiaries of the statute. The deceased was not entitled to the damages, nor was the right of action in him. The loss, for which recovery may be had, is the loss to survivors by his death. This would have been the same had he

died from natural causes. Since punitive damages cannot be recovered, the wrongfulness of that act cuts no figure further than to bring the case within the statute. The act causing the death must be willful or negligent. There is no reason why in the estimate of damages the ordinary rules of law should be departed from. The intention is always to give such damages, as under the circumstances of the case, are just. These words in the statute cannot change the rule unless they are interpreted to mean that the discretion of the jury shall be uncontrolled. It has not been so decided.

The statutes upon this subject seem to be framed upon the idea that the heirs will always constitute the family of the deceased. In some states the beneficiaries of this statute are so limited. We can easily understand that a life may be of great pecuniary value to such persons. Collateral heirs, at all events, must prove probable loss or their recovery will be limited to nominal damages.

The judgment and order are reversed and the cause remanded.

Garoutte, J., and McFarland, J., concurred.

Hearing in Bank denied.

[Crim. No. 500. Department One.—July 15, 1899.]

THE PEOPLE, Respondent, v. J. M. KING, Appellant.

CRIMINAL LAW—FORGERY—SUFFICIENCY OF INFORMATION—FORGING “NAME” TO CHECK.—An information for forgery which substantially conforms to the statute, and charges the forging of the “name of a certain person to the check, a copy of which is set forth in the information, showing that such name was signed to the check, and also charges that the defendant falsely uttered and passed the check as true and genuine, with intent to defraud a third person named, knowing the same to be false, forged, and counterfeit, states facts sufficient to constitute a public offense in such manner as to enable the defendant, as a man of common understanding, to know what was intended, and to enable him fully to prepare for his defense; and a demurrer thereto is properly overruled.

ID.—DEFECT IN FORM—SUBSTANTIAL RIGHT NOT PREJUDICED.—Any defect in form in such information in not specifically averring, CXXV. CAL.—24.

in the first part thereof, that the "check," as an instrument, or the "signature" thereof, was forged and counterfeited, is not such as tended to prejudice any substantial right of the defendant.

APPEAL from a judgment of the Superior Court of San Joaquin County and from an order denying a new trial. Edward I. Jones, Judge.

The facts are stated in the opinion.

J. J. Fitzgerald, for Appellant.

Tirey L. Ford, Attorney General, and A. A. Moore, Jr., Deputy Attorney General, for Respondent.

COOPER, C.—Defendant was convicted of the crime of forgery, and appeals from the judgment and order denying his motion for a new trial. The point most earnestly urged as ground for reversal is that the court erred in overruling defendant's demurrer to the information. The information charges that on the fifteenth day of August, 1898, in the county of San Joaquin, the defendant knowingly, feloniously, and with intent to defraud and damage one Mrs. Ewing, did falsely make, forge, and counterfeit the name of Mrs. E. M. Carson to a certain check, which check is fully set out in the information and is for the sum of fifteen dollars, drawn upon Wells, Fargo & Co.'s Bank. That the defendant on said day did willfully, knowingly, and falsely utter, publish, and pass as true and genuine the said check with intent to damage and defraud the said Mrs. Ewing, the defendant well knowing at the time of so uttering and passing the said check that the same was false, forged, and counterfeit. It is urged that the first part of the information charges the forging and counterfeiting of the name only and not of the instrument. Section 960 of the Penal Code of this state reads as follows: "No indictment or information is insufficient, nor can the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form which does not tend to the prejudice of a substantial right of the defendant upon its merits."

Section 959 provides that the indictment or information is sufficient if it can be understood therefrom: "6. That the act

or omission charged as the offense is clearly and distinctly set forth in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended."

Applying the above rules of our code to this information we think is sufficient. A copy of the check is set forth in the information, which is as follows:

"No. 93. San Francisco, Aug. 13, 1898.

"Wells, Fargo & Co.'s Bank, pay to J. M. King, or bearer, \$15.00, fifteen and & no-100 dollars.

MRS. E. M. CARSON."

The defendant is charged with having falsely forged and counterfeited the name of Mrs. E. M. Carson to this check. Without discussing imaginary distinctions between the meaning of "name" and "signature," we think that a person of common understanding by reading this information would know what was intended. There is not such defect in matter of form as would tend to the prejudice of a substantial right of defendant. An indictment or information is sufficient if it substantially conforms to the statute. (*People v. Mahlman*, 82 Cal. 585.)

And no one could say that defendant, as a man of common understanding, was not fully informed as to the acts which he had committed so as to enable him fully to prepare his defense. Again, the information charged the defendant with falsely uttering and passing as true and genuine the said false and forged check, knowing the same to be false and forged. We think the information did state facts sufficient to constitute a public offense, and that there was no error in overruling the demurrer. For the same reasons, the order of the court denying the defendant's motion in arrest of judgment was correct.

We think the judgment and order should be affirmed and so advise.

Gray, C., and Chipman, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are affirmed.

Harrison, J., Garoutte, J., Van Dyke, J.

Hearing in Bank denied.

[L. A. No. 543. Department One.—July 17, 1899.]

C. ORLANDI et al., Respondents, v. MRS. C. M. GRAY, Appellant, and Others, Defendants. LAMBERT J. HAYNE, Respondent, v. MRS. C. M. GRAY, Appellant and Others, Defendants.

MECHANICS' LIENS—SUBCONTRACT OF ARCHITECT—RECORD—PRESUMPTION.—A subcontract in favor of the architect with the contractor, which was attached to the original contract for the erection of a building, and recorded with it, must be presumed to have been made with the knowledge of the owner of the building; and, in the absence of fraud or deception, the mere dual position occupied by the architect does not *ipso facto* render either of the contracts void, or preclude the enforcement of liens in favor of persons performing labor and furnishing materials for the subcontractor.

ID.—COMPLETION OF BUILDING—OCCUPATION BY OWNER—SUBSEQUENT WORK—CONSTRUCTION OF CODE.—The occupancy of the building by the owner is conclusive evidence of its completion, within the meaning of section 1187 of the Civil Code, only when it is open, entire and exclusive, and inconsistent with a continuance by the contractor in the completion of his contract, and such as to give notice that the building is accepted in satisfaction of the contract. If the contractor continues the work of construction, or labor is done and materials are furnished, pursuant to the contract, after the occupation by the owner, such occupation is not conclusive evidence of completion, and does not start the statute in motion as to the time when liens should be filed.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial. M. T. Allen, Judge.

The facts are stated in the opinion of the court.

J. S. Chapman, for Appellant.

Borden & Carhart, for Respondents.

GAROUTTE, J.—This appeal arises upon the foreclosure of two mechanics' liens. At the trial the actions were consolidated and a single judgment rendered in favor of plaintiffs. An appeal is taken from that judgment, and also from an order denying the motion for a new trial. Only two questions of any importance are involved.

By the answer of defendant Gray, the owner of the building, it is alleged that the architect, Bourgeois, was a subcontractor for Pugh & Sons, the original contractors, and that plaintiffs in this action performed the labor and furnished the materials, for which they now seek a lien, for Bourgeois under his contract, with knowledge of the fact that he was the architect of the building and also a subcontractor. For these reasons it is claimed that the architect's contract with the original contractors is void, and that the architect's contract with these plaintiffs is also void. The trial court failed to make a finding of fact upon the issue created by this affirmative matter, and error is now predicated upon that failure. Whatever else may be said upon this contention, we deem it sufficient to say that the subcontract of Bourgeois was attached to the original contract and recorded with it in the recorder's office. This fact is admitted by the pleadings. Therefore, it must be held that the owner of the building was fully conversant with the fact, and under such circumstances the mere dual position occupied by Bourgeois of architect and subcontractor does not *ipso facto*, render these contracts void. There is no claim of actual fraud or deception, and in the face of the aforesaid admission no finding was necessary.

One of these plaintiffs was to furnish materials and do the staff work upon the building at an agreed price of nine hundred and twenty dollars. The other plaintiff was engaged to do certain sculpture work upon the front of the building at a wage of three dollars per day. The trial court found as a fact that the building was completed upon January 4, 1897, and this finding is now attacked as without support in the evidence. The building is a large building, and the owner, by herself and tenants, moved into it during the first half of October, 1896. It is now claimed by this appellant that the completion of the building dates from that time by reason of her occupation. This contention is based upon the following provisions of section 1187 of the Code of Civil Procedure: "And in cases of contracts the occupation or use of a building, improvement, or structure by the owner or his representative, or the acceptance by such owner or his agent of said building, improvement or structure, shall be deemed conclusive evidence of completion."

The owner now contends that under this provision of the code, she and her tenants having taken actual possession of the building, there resulted a "statutory completion" at that time, and the time for filing liens began to run at once. Under the peculiar facts of this case, such a construction of the statute would result in an absurdity, for here one of these lien claimants substantially did all his work after this occupation by the owner took place, and, therefore, by such a construction his time to file a lien began to run before he had performed any labor upon the building. The framers of the statute never intended any such results to follow; neither did they intend that such a subcontractor should be cut off absolutely from the right to file a lien upon the building. The present views of the court upon this question are well stated in *Willamette etc. Co. v. Los Angeles College Co.*, 49 Cal. 239. It is there said: "The occupation or use, however, which under the statute is to be deemed conclusive evidence of completion, must be open, entire, and exclusive, and not of such a character as would be consistent with a continuance by the contractor in the completion of his contract; and whether in any particular case there has been such occupation or use must be determined from the facts of that case, as in the ordinary case must be determined the fact of actual completion. One must be shown to have acted toward the contractor and in reference to the building in such a way as by necessary implication to give notice that the building had been accepted by him in satisfaction of the contract. A continuance by the contractor in the work of completing his contract, while the building, or a portion thereof, should be occupied by the owner, or even used by him for the purpose for which it was intended, would prevent such occupation or use from being regarded as conclusive evidence of completion."

It is now insisted that the rule of law quoted from the foregoing opinion is *obiter*. We will not pause to settle that contention. It is immaterial at the present time, for we deem the law there laid down eminently sound. Tested by the principle there declared, the facts of this case entirely fail to show an occupation or use by the owner which would start the statute in motion as to the time when liens should be filed; at

least, a finding of fact made by the trial court to that effect will not be disturbed. Let us look at the facts: The sculptor began his work about the time the owner went into possession. He continued his work for almost sixty days thereafter. This work was done under plans and specifications found in the original contract, and also under plans and specifications found in the subcontract of Bourgeois, which contract was attached to and filed with the original contract in the recorder's office. It thus appears that the owner, during all this time, had full knowledge of the circumstances under which the work was being done. In addition to this, we find these plaintiffs doing this work with the owner's consent and directly before her eyes. It necessarily follows that the occupation or use of the building by the owner was not exclusive. Neither was it inconsistent "with a continuance by the contractor in the completion of the contract." Again, in this case it may well be said the owner did not act toward the contractor, in reference to the building, in such a way as by necessary implication to give notice that the building had been accepted by her in satisfaction of the contract. Finally, the citation which we have quoted declares that a continuance of the work by the contractor, after the occupation or use by the owner would prevent such occupation or use from being regarded as conclusive evidence of completion; and that is exactly the case we have here. Tested by the law above declared, the finding of the court as to the time when the building was completed will not be disturbed.

For the foregoing reasons the judgment and order are affirmed.

Harrison, J., and Van Dyke, J., concurred.

[S. F. No. 1163. Department Two.—July 17, 1899.]

EMMA M. TAFT, Respondent, v. M. F. TARPEY, Appellant.

RESERVATION OF WAY—DEDICATION—PRESUMPTION.—The reservation in a deed of a strip of land "for canal or road purposes, both or either," so far as the language discloses, is for the benefit of the grantor alone; and in such case, or where the way is for the benefit of both parties to the deed, no presumption arises of any intent to dedicate the way to public use as a highway.

ID.—EFFECT OF PUBLIC USER.—It is only by actual user, and to the extent of such user by the public as a highway, that the public can acquire rights in any portion of a strip reserved for road and ditch purposes in a deed; and no such rights result from the terms of the deed.

ID.—RESERVATION OF ADJOINING STRIPS—ROAD AND DITCH PURPOSES—USER—INJUNCTION.—Where similar reservations are made by the same grantor in deeds of adjoining lands to different persons at different times of two adjoining strips, one upon each tract, and each thirty feet in width, for road and ditch purposes, and where the junior grantee occupied the outer half of the strip upon his land for an irrigating ditch, and for trees and vines, for over six years, and only the middle thirty feet of the adjoining strips was in fact used by the first grantee and by the public for road purposes during that period, he may be enjoined thereafter from threatened interference with such ditch, trees and vines, upon the alleged ground that both strips were wholly dedicated to public use as a highway by force of the reservations.

EVIDENCE—WIDTH OF LAND OCCUPIED BY DITCH AND TREES.—Both parties to the deeds of the adjoining lands having acted upon the assumption that they were keeping within their respective rights, and fifteen feet having been left upon each side of the road, evidence is admissible to show that the width of the land continuously occupied by the ditch, trees and vines was fifteen feet.

ID.—CUSTOM OF GRANTOR AS TO RESERVATIONS—DECLARATIONS—CONVEYANCE TO WITNESS.—Declarations of the common grantor as to his rule or custom in making reservations in deeds of lands are not competent; and it is not error to exclude a prior deed to a witness containing a similar reservation to those contained in the deeds to the parties to the injunction suit.

APPEAL from a judgment of the Superior Court of Fresno County from an order denying a new trial. Stanton L. Carter, Judge.

The facts are stated in the opinion.

Hart & Cleary, and A. C. Williams, for Appellant.

The strip having been dedicated as a highway, no part of it could be acquired by prescription. (*Watkins v. Lynch*, 71 Cal. 26; *Visalia v. Jacobs*, 65 Cal. 434; 52 Am. Rep. 203; *San Leandro v. Le Breton*, 72 Cal. 170; *Ex parte Taylor*, 87 Cal. 91; *Hargro v. Hodgdon*, 89 Cal. 623; *Southern Pac. R. R. Co. v. Ferris*, 93 Cal. 265; *Hoadley v. San Francisco*, 50 Cal. 265; 70 Cal. 320; *People v. Pope*, 53 Cal. 451; *Orena v. Santa Barbara*, 91 Cal. 621; Elliott on Roads and Streets, 125, 478.) The public is entitled to the use of the entire road; and whether the remainder of the strip is necessary is immaterial. (*Brown v. Stark*, 83 Cal. 636.) A partial user of a street or highway is an acceptance of the whole. (*Heitz v. St. Louis* 110 Mo. 618; *Derby v. Alling*, 40 Conn. 410; *Burrows v. Guest*, 5 Utah, 91; *Plaquemines etc. Police Jury v. Foulhouze*, 30 La. Ann. 64; *Sprague v. Waite*, 17 Pick. 309; *Hannum v. Belchertown*, 19 Pick. 311; *Simmons v. Cornell*, 1 R. I. 519; *Cleveland v. Cleveland*, 12 Wend. 172.) The defendant, having been specially injured, could abate the obstruction to the road. (*Helm v. McClure*, 107 Cal. 199, 205; *Visalia v. Jacobs*, *supra*; *Hargro v. Hodgdon*, *supra*; Civ. Code, secs. 3495, 3479, 3481, 3490, 3491.) It is not necessary that the supervisors should cause a road to be recorded as such to render a strip of land dedicated to the public as a public road a legal public highway. (*Blood v. Woods*, 95 Cal. 78; *Smith v. San Luis Obispo*, 95 Cal. 463; Pol. Code, sec. 2621.) The court erred in excluding evidence of the deed to the witness Bernhard, and of the acts and declarations of Eggers as to the dedication of the strips reserved in the deeds made by him. (*Tait v. Hall*, 71 Cal. 149, 150; Code Civ. Proc., sec. 1849; *People v. Blake*, 60 Cal. 503; *People v. Dreher*, 101 Cal. 271; *Helm v. McClure*, *supra*; *Kripp v. Curtis*, 71 Cal. 62; *People v. Eel River etc R. R. Co.*, 98 Cal. 665, 670, 671; *Harding v. Jasper*, 14 Cal. 649; *Quinn v. Anderson*, 70 Cal. 454.)

H. H. Welsh, for Respondent.

No presumption of an intention to dedicate the land as a highway could arise from the reservation made in the deeds. (9 Am. & Eng. Ency. of Law, 56, and cases cited in note, 2d ed., 50.) Where a road rests upon user, the boundaries of the

road are ascertained with reference to the user. (*People v. County of Marin*, 103 Cal. 231; *Freshour v. Hihn*, 99 Cal. 447.)

CHIPMAN, C.—Injunction. Plaintiff seeks to restrain defendant from entering upon her land for the purpose of opening a road over the same. Defendant claims that the strip of land in question was dedicated to the public for a road by plaintiff's predecessors in estate, and was also reserved for road purposes from the deed by which she claims title. The court found the following facts: That on April 21, 1884, one George H. Eggers was the owner in fee of the west half of the southeast quarter of section 20, township 13 south, range 21 east, situated in Fresno county, and on that day conveyed the same to George W. Taft (plaintiff's husband) by deed which contained a clause following the description of the land, to wit: "Reserving from this grant the right of way over a strip of land thirty feet wide on the westerly line of said tract of land for canal or road purposes, both or either"; said Taft entered into possession and occupied the premises until July 15, 1895, when he conveyed the land to plaintiff, who has ever since occupied and now occupies the same; in 1883 said Eggers conveyed the east half of the southwest quarter of the same section (lying directly west of plaintiff's land) by deed in which, following the description, is the following clause: "Saving and excepting therefrom a strip of land thirty feet wide off the east side of said tract of land, and a strip of land thirty feet wide off the west side of the northwest quarter of said section 20 . . . said excepted strips of land being reserved for road and ditch purposes"; in January, 1884, said Eggers conveyed to defendant the northeast quarter of said section, "reserving therefrom a road and ditch way on the easterly side thereof"; in 1890 plaintiff's grantor constructed a ditch for purposes of irrigation along the eastern side of the strip of land so reserved from his deed for a distance of one quarter of a mile; this ditch and its banks occupied a strip of land fifteen feet wide for its entire length; Taft planted fig trees and grapevines along the western bank of said ditch and in a straight line to the south boundary of his lands; the ditch occupied no more land than was necessary for its purposes, and there is not now and never has been any highway or traveled road upon said

thirty foot strip east of said line of fig trees and vines since the same were planted there"; in 1889 defendant entered upon the strip of land reserved as aforesaid, between the lands of plaintiff and the said lands directly west of plaintiff's lands, and graded and built a wagon road along the center of these two strips about thirty feet wide, occupying fifteen feet of the strip reserved from plaintiff's land, and plaintiff's said ditch and trees and vines "do not in any way interfere with or obstruct the free use of said road and roadway by defendant or any other person; this road is the most convenient means by which defendant can have egress from his said lands in the direction of the city of Fresno"; the court found and the defendant admits that he intends to enter upon the remaining portion of said strip of land and dig up and destroy plaintiff's said ditch and trees and vines; the board of supervisors of Fresno county never accepted said strip of land as a highway, nor did they ever declare the same to be a highway."

As conclusions of law, the court found the plaintiff entitled to judgment restraining defendant from "interfering with or digging up the portion of said premises upon which is now constructed plaintiff's ditch, and on which is planted plaintiff's said fig trees and vines, or from in any way entering upon said thirty foot strip of land east of the line of fig trees and vines and ditch of plaintiff, and from . . . constructing . . . a wagon road thereon." Judgment was entered accordingly, from which and from an order denying defendant's motion for a new trial this appeal is prosecuted.

1. The principal question discussed by counsel arises out of the reservation in Eggers' deed to Taft in 1884. Appellant claims that this clause in the deed operated as a dedication to the public for a highway, and that the interest of the public extended and attached to the donation in its entirety, upon no part of which had plaintiff a right to encroach and plant trees or dig ditches. We cannot regard the language of the deed as showing an intention to dedicate the land for a public use in any such way as to conclude the owner, and unless by the terms of the instrument such intention can be reasonably affirmed there was no dedication effected by the deed itself. The condition or reservation, so far as the language discloses,

was for the benefit of the grantor alone. In such case or where the way is for the benefit of both parties to the deed, no presumption of any intention to dedicate such way to the public arises. The reservation was not only for road purposes, but also for ditches, and the public were equally entitled, if at all, to the way for both purposes. But it cannot be said that a use by the public for ditches was contemplated, for the public had no occasion for ditches, while the grantor might have.

We must look elsewhere than to this deed for any right in the public. There is no evidence that Eggers ever made known his intention as to this strip of land prior to the purchase made by plaintiff and defendant. Defendant purchased his land in January, 1884, and plaintiff's grantor purchased in the following April. Defendant testified: "Inasmuch as I was buying the land, and the county road was a half-mile away, I wanted to know whether I was going to have access to my land. I asked him [Eggers] about what reservations there were for roads in order to get to the county road, and he pointed out this reservation and said it was his purpose with any purchaser of land as between his northern land and the county road to leave a road where they could pass and the public could travel to do their business." Defendant says he examined the record "and found that he had done so in all cases as he had stated, and accepted it as such." But plaintiff's grantor's deed was not then in existence, and defendant could not have referred to the reservation now in question. A former owner of the land directly west of plaintiff's land, on which was also a reserved strip, testified that in 1889 he heard Eggers say "that he had dedicated to the public thirty feet off the west side of the land owned by Mr. Taft for road and ditch purposes for the use of the public who bought his land." But this was five years after Taft had bought the land, and besides the declaration was not that the whole strip was for road purposes. Plaintiff's grantor, Taft, testified: "At the time I accepted the deed I did not know anything about the reservation. I supposed there was thirty feet there, but didn't know whether it was thirty feet off me or thirty feet off both parties. I have talked with Mr. Eggers with reference to the matter. He has told me frequently that he reserved a road there . . . for road and ditch purposes,

and he was surprised that Mr. Tarpey was trying to take the whole shooting match." In this there was no declaration that the entire strip was for road purposes. The evidence tended to show that before plaintiff's ditch was dug there was no defined road in use along the west line of her land. Plaintiff testified: "After the fig trees were planted there was no travel east of them; . . . there was never any defined roadway west of the place at any time before this present road was placed there (the road opened by defendant) other than a mere trail leading up and down there. And the wagon tracks east of the line of fig trees ran diagonally through; in fact, they seemed to go where they wanted to over the place, all over the land, prior to the time the fence was built across the front. The fence was built in 1889." Defendant did not use this means of access to his land until in 1889, five years after his purchase, when he graded the road thirty feet wide, taking fifteen feet from each of the reserved strips, and since that time this graded road has been in use by the public with the knowledge and consent of plaintiff and her grantor. There is no evidence of the use by the public of the entire sixty feet embraced in the two strips at any time. The only defined road shown to have been in use since Eggers sold to plaintiff's grantor and defendant is a road thirty feet wide, which plaintiff concedes is a public highway and which the court found upon sufficient evidence is of ample width for all public purposes without encroaching upon plaintiff's land any further than as now located. This road has its origin as a public road not by force of the deed of Eggers to Taft, but by subsequent dedication to and user by the public. It was probably the intention of Eggers that there should be roads for public use along all the reservations mentioned in the deeds made by him, but this intention was not expressed in the deeds and was not carried out otherwise by him. The public acquired the right in the instance before us by the acquiescence and other acts of dedication by plaintiff and her grantor, and by the declarations of Eggers made after he sold the land.

The declarations of Eggers show that it was not his intention that the entire width of sixty feet should be dedicated to the public for road purposes, for he included a way for ditches as well, and he expressed surprise that defendant should as-

sume that the whole width was for a road. Besides, both defendant and plaintiff by herself and her grantor acted upon this view of the reservation, and defendant opened and graded a road thirty feet wide, leaving fifteen feet for a ditch, which plaintiff's grantor occupied for ditch purposes about the same time. Defendant built the road in the spring of 1889, and Taft built the ditch and planted his trees and vines in February, 1890. This action was brought March 31, 1896. For six years defendant and the Tafts acted on the assumption that they were keeping within their rights; and as it was only by this actual user, and not by the terms of the deed, that they and the public acquired any rights, we do not see that defendant can now be heard to complain.

2. It is claimed as error that evidence was admitted to show the width of the land occupied by the ditch and trees and vines, the objection being that the deed dedicated the entire strip for road purposes, and it was immaterial where the ditch and trees were, as the public had a right to the whole thirty feet. There would be merit in the objection if we could adopt defendant's construction of the deed. Upon the view of it we have taken the evidence was relevant.

3. It is assigned as error that defendant was precluded from proving that Eggers had made a reservation similar to that in plaintiff's deed in the sale of land to witness, and that Eggers told witness "that it was his rule when he sold his land out there he reserved thirty feet right of way all around these places." This was not error. Witness bought his land in 1883. The evidence had no necessary connection with the purchase by Taft in 1884. Plaintiff admitted that the deed of witness contained a reservation similar to that in question. It was not competent to prove a custom or rule of Eggers in making deeds to land, and this is as far as the evidence proposed to go. We cannot see that its exclusion was prejudicial to defendant.

4. It is objected that the evidence does not support the fourth, fifth, and seventh findings. They are to the effect that the ditch occupies no more land than is necessary to its reasonable use; that the roadway is of sufficient width for all purposes of a highway, and as now used is not obstructed in any way by said ditch; that defendant threatens to enter

upon said land and dig up and remove said ditch. Defendant's answer declares his purpose to be as found by the court and justifies the finding, and we think there is sufficient evidence to support the other findings.

Discovering no reversible error, it is advised that the judgment and order be affirmed.

Haynes, C., and Gray, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are affirmed.

McFarland, J., Temple, J., Henshaw, J.

[L. A. No. 167. Department Two.—July 17, 1899.]

H. W. HELLMAN, Respondent, v. CITY OF LOS ANGELES, Cross-complainant and Respondent. BOAZ DUNCAN et al., Appellants. I. W. HELLMAN et al., Respondents.

ACTION TO QUIET TITLE—BOUNDARY OF STREET—CROSS-COMPLAINT OF CITY—UNCERTAINTY.—In an action against a city to quiet title to a lot of land involving the boundary of a street, a cross-complaint by the city against the plaintiff and other defendants brought in as parties to quiet the title of the city to the street, which is alleged to have been encroached upon by their improvements, but which does not locate the boundaries of the street, nor show to what extent their improvements have encroached upon it, is demurrable for uncertainty in those particulars.

ID.—EVIDENCE—LOCATION OF BOUNDARY—LOSS OF MONUMENTS—CONFORMITY OF STREET IMPROVEMENTS TO LOT IMPROVEMENTS.—Where it appeared in evidence that all of the monuments of the official survey of a street were lost, and the question of fact upon which the rights of appellants depended related to the location of the south boundary of the street, evidence that all of the improvements on such boundary conformed to the line of appellant's improvements on a corner lot derived by deed from the city, and which had occupied that line for twenty-five years, and that during that period the sidewalk and street improvements were all made to conform to that line, is competent evidence to show the location of such boundary.

ID.—INCOMPETENT EVIDENCE OF ENGINEERS—INACCURATE SURVEY.—Where it appears that the official survey of the street in controversy was inaccurate, and there was no proof as to the lines originally established by it, other than the line of improvements of

the lots and sidewalks thereupon the evidence and maps of engineers not based upon the official survey, but upon the assumed correctness of the line of improvements of another street, and upon the supposition of a uniform width of the streets, and involving the alteration of the length of lots shown by the official map, and constituting mere guesswork as to the location of the lines of the official survey of the street in question, is incompetent and inadmissible.

ID.—INACCURACY OF EARLY SURVEYS—COMMON KNOWLEDGE—JUDICIAL NOTICE.—The inaccuracy of the early surveys in this and other states is a matter of common knowledge of which the courts may take judicial notice.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order denying a new trial. Walter Van Dyke, Judge.

The facts are stated in the opinion.

Brown & Newby, for Appellants.

The city, having permitted the appellants and other property-owners to build to the line claimed by appellants, and having continuously collected street assessments and taxes to conform thereto, is estopped from claiming any other line as the line of the street. (*Orena v. Santa Barbara*, 91 Cal. 628; *Los Angeles v. Cohn*, 101 Cal. 374; *Gregory v. Knight*, 50 Mich. 61; *Joliet v. Werner*, 166 Ill. 34; *Auburn v. Goodwin*, 128 Ill. 57; *Peoria v. Johnston*, 56 Ill. 45; *Davies v. Huebner*, 45 Iowa, 577; *Simplot v. Dubuque*, 49 Iowa, 630; *Brooks v. Riding*, 46 Ind. 15; *Hamilton v. State*, 106 Ind. 361; *Ralston v. Miller*, 3 Rand. 44; 15 Am. Dec. 704.) The testimony of the surveyors not based upon the official survey, or upon any competent proof thereof, was inadmissible. (*Lay v. Neville*, 25 Cal. 555.) Their maps were inadmissible, not being based upon the survey called for by the deed of appellants' lots, and they cannot bind appellants or their predecessors. (*Payne v. English*, 79 Cal. 546; *Gregory v. Knight*, *supra*.) The demurrer to the cross-complaint should have been sustained.

Walter F. Haas, and W. E. Dunn, for City of Los Angeles, Respondent.

The testimony of the surveyors, and their maps, was the best of which the nature of the case admitted, and they were

admissible. (*Lay v. Neville*, 25 Cal. 554; *Morton v. Folger*, 15 Cal. 278, 279.) The city did no acts estopping it, and the appellants could gain no title by prescription to any part of the street. *Los Angeles v. Cohn*, 101 Cal. 374, was an exceptional case, and is not applicable here.

McKinley & Graff, for H. W. Hellman, Respondent. Graves, O'Melveny & Shankland, and Gardiner, Harris & Rodman, for Other Respondents.

GRAY, C.—This action was commenced by the plaintiff against the city of Los Angeles to quiet title to a certain lot of land at the northeast corner of Spring and Fourth streets in the said city. The city filed a cross-complaint alleging that the appellant, Boaz Duncan, and other parties, all of whom were subsequently brought in and made parties to the action, owned lots along and fronting on Fourth street, on both sides thereof, between Spring and Main streets, and that all these lotowners, including the plaintiff, had "so encroached upon Fourth street, both upon the north and upon the south, that the width of said Fourth street, as it now exists upon the ground between the fences and other improvements of said parties, is considerable less than sixty feet." The cross-complaint also sets forth that in 1849 a survey and map of said city was made, known as Ord's survey, which was adopted as the official map of said city, and which shows Fourth street to have a uniform width of sixty feet. The principal relief prayed for in the cross-complaint is that the lines of Fourth street be determined, and that the claims adverse to the use of Fourth street as a public street of said city be forever quieted. The appellant demurred to this cross-complaint for insufficiency of facts to constitute a cause of action, and for uncertainty because the north and south boundaries of Fourth street were not set out and it could not be ascertained therefrom to what extent the improvements of the several parties, including appellant, encroached upon said street. In overruling this demurrer the court erred. The complaint was uncertain in the particulars specified in the demurrer. Whether the suit be treated as an action to quiet title or to establish the boundaries of Fourth street, the appellant was entitled to be informed by the cross-

complaint specifically as to what portion of the premises occupied by him were claimed to be an encroachment and within the boundaries of Fourth street.

We are also of opinion that the evidence is insufficient to justify the decision of the court. So far as the appellant's rights were concerned, the question of fact to be decided was as to the exact location of the south boundary of Fourth street, at the place where appellants' property was located, according to Ord's survey, which is conceded to be the original and official survey of the city of Los Angeles. Appellants introduced evidence tending to show that those under whom they claim title acquired the same by deed from the city of Los Angeles November 21, 1855, and that appellants' predecessors in interest erected a picket fence along Fourth street, on the line now occupied by the northerly line of appellants' building on the southeast corner of Spring and Fourth streets; that said fence was moved in the year 1888, when said building was erected; that said Fourth street was paved and the sidewalk built to the line occupied by said building, and the owners of said property paid their proportion of said assessment for said paving up to said line; that up to 1897 all the improvements on the south side of Fourth street, between Spring and Main, were on a line occupied by defendants' building and had occupied that line for at least twenty-five years prior thereto. This was the best evidence introduced and the only competent evidence offered to show the location of the south line of Fourth street.

The testimony of the engineers was incompetent to establish the location of Fourth street, and the objection to such testimony should have been sustained, and the same may properly be said of the maps, with the exception of the Ord map; this map, and the contract in pursuance of which it and the Ord survey were made, was proper evidence in the case, but the map could not locate itself on the ground. It appeared in evidence that all the monuments of the Ord survey were lost, and no attempt was made to establish their location, either by reputation, the declarations of deceased persons, or by the testimony of witnesses having knowledge of such location, but it seems that in the absence of any such evidence the engineers have attempted to locate the streets by selecting the most uniform street in the oldest part of the city,

and, assuming that one boundary of that street is on the Ord survey, they propose to locate the other streets of the city by first measuring the distance required by the Ord map and then adding to or subtracting from such distance as may be required to leave all the streets of a uniform width of sixty feet and require the removal of as few buildings as may be. In making their measurements on the ground they have disregarded the Ord map. They make the block in which appellants' lot is situated five hundred and ninety-nine and seventy-six one-hundredths feet long, and the block immediately across Fourth street from and north of said lot they find to be six hundred and five and seven one-hundredths feet long, whereas the Ord map gives the blocks a uniform length of six hundred feet. They might have come nearer the map if they had given the blocks on each side of Fourth street a more nearly uniform length by placing Fourth street two or three feet further north. The work and testimony of the engineers is only a guess at the location of Fourth street as originally established by the Ord survey. It may be proper, in the absence of any better evidence, to regard the line of ancient and continuous improvements as evidencing the line of Sixth street as it was run by the Ord survey, but no use of this line can be made to establish any other line in the city for two reasons: 1. The engineers have demonstrated by their measurements, and their testimony is an admission, that the Ord survey must have been very inaccurate; 2. The inaccuracy of the early surveys in California, as well as in other states, is a matter of such common knowledge that the courts are warranted in taking judicial cognizance of the existence of such inaccuracy, as they frequently have done. It needs no argument to show the impossibility of locating an unknown line of an inaccurate survey by running from a known line of the same survey. In the absence of better evidence, the court might have been warranted in finding for appellants on the evidence as to the south boundary of Fourth street as it had been indicated on the ground by the line of fence and other improvements for twenty-five years. (*Diehl v. Zanger*, 39 Mich. 601; *Orena v. Santa Barbara*, 91 Cal. 621.) There was no competent evidence in the testimony or maps of the engineers to show the location of the southern boundary of Fourth street, and,

therefore, the judgment of the court has nothing to support it. We think the conclusions reached herein find support in the following cases: *Payne v. English*, 79 Cal. 540; *Los Angeles v. Cohn*, 101 Cal. 374; *Bullard v. Kempf*, 119 Cal. 9; *Orena v. Santa Barbara*, *supra*; *Ralston v. Miller*, 3 Rand. 44; 15 Am. Dec. 704.

For these reasons we advise that the judgment and order appealed from be reversed.

Cooper, C., and Chipman, C., concurred.

For the reasons given in the foregoing opinion the judgment and order appealed from are reversed.

McFarland, J., Temple, J., Henshaw, J.

[Crim. No. 536. In Bank.—July 17, 1899.]

In re ALFRED CLARKE, upon Habeas Corpus.

INVOLUNTARY INSOLVENCY—AMENDED PETITION—APPEARANCE OF DEFENDANT—MOTION TO STRIKE OUT—RESERVATION.—A defendant in involuntary insolvency who first appears after the amendment of the petition by adding the names of new creditors, upon which no citation was issued, and moves to strike out the amended petition and parts thereof, on grounds not including a want of jurisdiction of his person, makes a general appearance, notwithstanding an express statement in the motion to the contrary, and an express reservation of his "right to be brought into court by the issue of regular process."

ID.—NATURE OF APPEARANCE, HOW DETERMINED—CHARACTER OF RELIEF.—The nature of an appearance, as being special or general, is determined by the character of the relief asked and not by the expressed intention of the defendant. One who appears and objects to the consideration of a case for want of jurisdiction of his person, appears specially, whether he so states or not. But if he appears and asks for relief which can only be given to a party in a pending cause, the appearance is general, although it may be expressly declared to be special.

ID.—JURISDICTION OF PERSON OF DEFENDANT—MOTION—DEMURRER—ANSWER.—Where, upon the first appearance of the defendant in the insolvency proceedings, he asked favors by motion which could only be demanded by a party to the record, and, upon his motion being denied, he demurred to the petition upon nearly all of the statutory grounds, and also filed an answer upon which issues of fact were raised and tried, he submitted himself to the jurisdiction of the court, and cannot complain that he was not properly brought in by citation.

- ID.—FAILURE TO GIVE BOND—ABATEMENT—ADJUDICATION OF INSOLVENCY—WAIVER.**—The failure of the creditors to give bond does not render the insolvency proceedings absolutely void; but it is matter of abatement which must be taken advantage of prior to a trial of issues upon which an adjudication of insolvency is had; and, if not specifically urged prior to such trial and adjudication, it is waived. The objection cannot be urged subsequently to the adjudication.
- ID.—OBJECTION TO FORM OF BOND AND SUFFICIENCY OF SURETIES.**—An objection to the form of the bond filed under the original petition, and to the sufficiency of the sureties thereupon, is a waiver of objection to the lack of a bond.
- ID.—AMENDED PETITION—LACK OF NEW BOND—WAIVER OF OBJECTION.**—Where the petition was amended by adding the names of other creditors, without the filing of a new bond, and a trial was had under the amended petition, without objection to the power of the court to allow the amendment, or calling its attention to the fact that a new bond had not been filed under the amended petition, owing to the apparent belief of the insolvent that the bond given under the first petition would serve under the amended petition, all objection to the lack of a new bond is waived.
- ID.—FORM OF ADJUDICATION—FINDINGS—CONCLUSION OF LAW.**—Formal findings of facts and conclusions of law are not necessary upon an adjudication of insolvency, and the adjudication is complete in form and substance if the court by order adjudges that the defendant was insolvent on a specified date prior to the filing of the petition, and ever since has been, and still is, insolvent; and the fact that it proceeds unnecessarily to add as a conclusion of law that the defendant was insolvent on that date cannot affect the sufficiency of the adjudication.
- ID.—INCOMPLETE ENTRY IN MINUTES.**—The order of adjudication of insolvency is interlocutory, and should be entered in the minutes; but the fact that it was not entered, or that the entry made by the clerk was incomplete or informal does not render the adjudication invalid, if the order was in fact sufficient in form and substance.
- ID.—CITATION TO INSOLVENT TO ANSWER CONCERNING PROPERTY—CONTEMPT—PUNISHMENT.**—After the adjudication of insolvency and the ordering of the defendant to file schedules, with which order he failed to comply, the court may cite him to answer concerning his property, and, upon his refusal so to do, may punish him for contempt, by imprisonment until he consents to answer. The addition of imprisonment for one day, and until, et cetera, is immaterial, where the defendant did not avail himself of the privilege of answering during the day.
- ID.—PRESENCE OF DEFENDANT.**—Where the defendant answered the citation for contempt by challenging the jurisdiction of the court in a written statement, which was taken under advisement and overruled, the defendant cannot object that he was not personally present in court when the contempt was adjudged.

ID.—VOLUNTARY PROCEEDINGS IN INSOLVENCY—DISCHARGE—JURISDICTION OVER INVOLUNTARY PROCEEDINGS.—The fact that the insolvent, after the adjudication of insolvency in the proceedings by the creditors, instituted voluntary proceedings in insolvency, and obtained a discharge therein, whatever effect such discharge may have as a plea in bar in a proper case, could not operate to deprive the court of jurisdiction over the prior proceedings by the creditors in involuntary insolvency.

HABEAS CORPUS—BURDEN OF PROOF—CONTEMPT PROCEEDINGS—SHOWING FOR CITATION.—Upon *habeas corpus*, the burden is upon the petitioner to show that a restraint which is apparently legal is not so; and if a commitment for contempt states facts sufficient to authorize a citation to the defendant, and there is no proof upon the subject, he cannot be released upon *habeas corpus* upon the ground that there was not a sufficient showing in the superior court to authorize the issuance of the citation.

ID.—ALLEGED WANT OF JURISDICTION—CONSTRUCTION AGAINST PETITIONER.—The allegations of a petition for a writ of *habeas corpus* to review proceedings for contempt, for an alleged want of jurisdiction over the proceedings in which the contempt was adjudged, are to be taken most strongly against the pleader.

HABEAS CORPUS in the Supreme Court, to review the legality of a commitment for contempt by the Superior Court of the City and County of San Francisco. James M. Troutt, Judge.

The facts are stated in the opinion of the court.

T. M. Osmont, for Petitioner.

Clarence W. Ashford, Assignee of Alfred Clarke, opposing petition.

TEMPLE, J.—The petition shows that on the second day of October, 1891, six creditors of petitioner filed a petition in the superior court asking to have him adjudged an insolvent. An order to show cause was issued, signed by the judge but not made by the court. The bond given was not signed by the petitioning creditors. October 29th the petition was amended by adding three new creditors, and in other respects. No new bond was given after the amendment, and no new citation was issued. November 7, 1891, petitioner appeared and moved to strike out the petition on various grounds, and also demurred. The motion was denied and the demurrer overruled. He answered, a trial was had and an order was made May 12, 1892, which adjudged that

on the fourteenth day of September, 1891, Alfred Clarke was an insolvent debtor, and petitioner was ordered to file schedules as required by law.

Petitioner represents that he has always challenged the jurisdiction of the court on various grounds, and particularly because no bond was given as required by the statute. It is further charged that the order of adjudication has never been entered, and that petitioner moved in the superior court to have the proceedings dismissed because the judgment was not entered within six months after it was made.

Petitioner also states that while said ineffective proceedings were pending he made application to be declared an insolvent, and that on his petition and notice an adjudication was made, and such proceedings were afterward had in the matter that on the sixth day of November, 1893, a decree was entered discharging him from all debts. The decree has never been vacated, suspended, or appealed from.

It further appears from the petition that a citation was issued out of the superior court requiring petitioner to appear on a day named and answer concerning his property. He did appear, and the matter was continued from time to time until at last he failed and refused to appear and make answer to inquiries concerning his property. A citation was then served upon him requiring him to appear on the third day of February, 1899, to show cause why he should not be adjudged guilty of a contempt of court for failing to appear and answer questions. He appeared by counsel and showed cause by a demurrer and by an answer. The demurrer was overruled and the answer held insufficient, and he was adjudged guilty of a contempt of court and was committed until he would consent to answer touching the insolvent estate. By virtue of such order he is now being deprived of his liberty.

The evidence shows that the petition is incorrect in some of the most material points. The first appearance of Clarke in the insolvency proceeding was by a motion to strike from the files the amended petition for various reasons, among which are: 1. It was wrongly entitled; 2. Did not conform to leave granted to amend; and 3. Certain specified portions were impertinent, irrelevant, and immaterial. No point was

made that the court had not obtained jurisdiction of the person of defendant except that it is stated: "This paper is not a general appearance or an appearance to the merits, and respondent reserves his right to demand that he be brought into court by the issue of a regular process."

On general principles, a statement that a defendant or party makes a special appearance is of no consequence whatever. If he appears and objects only to the consideration of the case, or to any procedure in it, because the court has not acquired jurisdiction of the person of the defendant, the appearance is special, and no statement to that effect in the notice or motion is required or could have any effect if made. On the other hand, if he appears and asks for any relief which could only be given to a party in a pending case, or which itself would be a regular proceeding in the case, it is a general appearance no matter how carefully or expressly it may be stated that the appearance is special. It is the character of the relief asked, and not the intention of the party that it shall or shall not constitute a general appearance, which is material. (See 2 Ency. of Pl. & Pr., 625, notes, and cases cited.)

As a rule one cannot avail himself of the advantage of being a party and escape the responsibilities. Some early cases in this state (*Deidesheimer v. Brown*, 8 Cal. 340, and *Lyman v. Milton*, 44 Cal. 631) seem to hold that a defendant having first objected to the process or service by which he was brought in, may then, if his objections are overruled, answer to the merits, and on appeal from the judgment still avail himself of his objections to the jurisdiction of the court over him. This rule seems unjust and illogical, and I think does not prevail elsewhere. It gives the defendant, whose objections to the jurisdiction of the court have been erroneously overruled, an opportunity to go to trial, and if the judgment is favorable to abide by it, while if it is unfavorable he can procure a reversal. The plaintiff would have no such advantage. And what would be the condition of such a defendant after reversal? If the reversal means that he is not yet in the case, he may move to dismiss under section 581. If it merely gives him a new trial, the procedure seems farcical.

In this case by his first appearance, Clarke asked favors

which could be demanded only by a party to the record, and, upon his motion being denied, he demurred to the petition upon nearly all the statutory grounds. He also filed an answer, which raised issues of fact, upon which a trial was had and findings were filed. Certainly by these proceedings he submitted himself to the jurisdiction of the court.

Is the proceeding absolutely void because no bond was given? *Anderson v. Superior Court*, 122 Cal. 216, was a petition for a writ of prohibition, and it was said, in effect, that though the alleged insolvent might have waived the bond, the court should not proceed in the matter against his objection. It would seem, then, if he did not object it might be considered as waived. No specific objection on this ground was made by the petitioner, at least until long after the adjudication of insolvency. In his notice of motion to strike out he stated as one of his grounds "that the court had not acquired jurisdiction to proceed under the amended petition." The same notice discloses that he was urging as an objection that the proceedings were wrongly entitled, and that the petition could not be amended, and no doubt these were the reasons why he thought the court had no jurisdiction. No other reasons are suggested.

In his demurrer he stated as one ground that "the court has no jurisdiction of the person of the defendant or of the subject of the action." As he also demurred for insufficiency of the statement of facts, the demurrer itself, constituted an appearance which gave the court jurisdiction of the person, if it had not already acquired it. There was no objection for lack of a bond. The petition avers that four days after the petition was filed Clarke appeared and objected to the form of the bond and the sufficiency of the sureties. The sureties failed to justify, but his objections were ignored. This is most decidedly a case where the allegations must be taken most strongly against the pleader. This notice may itself be construed into a waiver of all other objections to the bond. Several other instances are recited in the petition, but the particulars are not given, except that on January 5, 1894, he moved the court to vacate the judgment on the ground that no legal process was ever issued and no bond was given under the amended petition; and in October, 1894, he again moved the court to vacate the order because it had never

been entered. The adjudication was made May 12, 1892.

We find, therefore, that Clarke specifically objected to the form of the bond and to the sufficiency of the sureties, and at the same time denied the numerous allegations and charges of wrongdoing contained in the petition, and his insolvency, and caused a trial to be had of such issues, without calling the attention of the court to the fact that a bond had not been given. Doubtless he conceded the power of the court to allow an amendment, and believed that the bond already given under the first petition would serve under the new. The objection was in the nature of a plea in abatement, and I think it was waived.

It is objected that no sufficient adjudication was made and that it has never been entered.

The adjudication is complete in form and substance. It states that all the allegations in the amended petition are true, and that Clarke was on the fourteenth day of September, 1891, and ever since has been, and still is, insolvent. The adjudication then proceeds unnecessarily to add as a conclusion of law that Clarke was, on the fourteenth day of September, 1891, an insolvent debtor. This is what the petitioner calls the adjudication. The document is one, and whether the court says it "finds" or "adjudges" or "decrees" or "considers" is immaterial. Formal findings were not required, and it is sufficient if the court by order adjudges the respondent in such proceeding insolvent, as required by statute.

The clerk did, however, make an entry of an order in his minutes. It is too brief—a trouble not infrequent in clerical work. After the title it is: "This matter having been heretofore submitted to the court for consideration and decision, and now the court having fully considered the same, it is ordered that Alfred Clarke be, and he is adjudged and declared to be, an insolvent debtor." From this order so defectively entered Clarke appealed to this court, and the order was affirmed. Perhaps the court, as in the case of *Miller v. Lux*, 100 Cal. 609, considered itself justified in looking to the entire record, including the findings. It is there said that, though findings are not required, still if made they constitute a part of the judgment-roll.

No other entry than the minutes of the court was required. (*In re Blythe Estate*, 110 Cal. 229.)

The adjudication is but an interlocutory order from which an appeal is specially provided.

It should have been entered in the minutes, and an informal entry of it was made. Even if it be considered a judgment, and the attempted appeal from it was ineffectual, the fact that it was not entered does not render it invalid. (*Estate of Cook*, 83 Cal. 415; *Marshall v. Taylor*, 97 Cal. 422.)

Petitioner contends that there was not sufficient showing before the superior court to justify the issuance of the citation to him. Upon *habeas corpus* the burden is upon the petitioner to show that a restraint which is apparently legal is not so. The commitment states facts sufficient to authorize the citation and there is no proof upon the subject.

The examination was postponed from day to day, and finally Clarke failed to be present at the appointed time. An order was served on him requiring him to appear and show cause why he should not be punished for a contempt in refusing to appear. He showed cause by a written statement challenging the jurisdiction of the court. This was taken under advisement by the court and finally overruled, and the petitioner was adjudged guilty of a contempt and was committed for one day and until, et cetera.

He now contends that he should have been present in person. His showing in response to the order was heard and considered, and this was his own chosen method. He will not be heard to say he was not present.

The sentence was objected to because it provides for an imprisonment for a definite term of one day. It is contended that he could only be imprisoned until he would consent to testify. I think this is a mistake, but if not the illegal part is void.

The portion not inflicting a punishment is not within the rule declared in *Ex parte Kelly*, 65 Cal. 154. To strike out the direction that he be imprisoned for one day would vacate the entire punitive part of the order. Had he consented during the day to testify, he might then have raised the point.

I cannot see that the voluntary proceedings by which petitioner claims to have been discharged as an insolvent, if proven here, as they were not, could help the petitioner. Such

a discharge might in a proper case be pleaded in bar, but the fact would not deprive the court in which the other proceeding is pending of jurisdiction.

The prisoner is remanded.

Harrison, J., McFarland, J., Van Dyke, J., Garoutte, J., and Henshaw, J., concurred.

[L. A. No. 691. Department One.—July 18, 1899.]

In the Matter of the Estate of JOHN B. PACKER, Deceased.

ESTATES OF DECEASED PERSONS—SALE OF REALTY FOR BENEFIT OF HEIRS—VESTED RIGHTS—CONSTITUTIONAL LAW.—Upon the death of the ancestor, the heirs become at once vested with the full property in his real estate, subject only to liens or burdens then existing or created by statutes then in force; and the legislature has no constitutional power, by a subsequent enactment, to interfere with the vested rights of the heirs to dispose of their own property, by authorizing a sale of the realty to be made by an executor or administrator solely for the benefit of the heirs.

APPEAL from an order of the Superior Court of Los Angeles County for the sale of the real estate of a deceased person. W. H. Clark, Judge.

The facts are stated in the opinion.

James Burdette, for Appellant.

Charles L. Batcheller, for Respondent.

CHIPMAN, C.—Pending administration of the above-entitled estate the administrator filed his petition praying for an order to sell certain real property belonging to the estate "on the ground that it was for the advantage, benefit and best interests of the estate and those interested therein," setting forth in detail "in what way an advantage and benefit would accrue to the estate, and those interested therein, by such sale." An order was duly made reciting the substance of the petition and fixing the time and place for its hearing. This order was duly published as required by law. Upon the hearing proofs in support of the petition were submitted,

and no one interested in the estate opposed the application. The sale was ordered and made in due course, and was duly confirmed after hearing of returns of account of sale and upon due notice. The surviving wife of deceased, one of the heirs at law, appeals.

The petition showed that there were no debts, expenses, or charges of administration to be met, and that the only ground for the order was as above stated. Section 1537 of the Code of Civil Procedure, as amended in 1893, reads: "And if said order for sale of real estate is petitioned for on the ground that it is for the advantage, benefit, and best interests of the estate and those interested therein that a sale be made, the petition . . . must set forth in what way an advantage or benefit would accrue to the estate, and those interested, by such sale," et cetera. Section 1538 of the Code of Civil Procedure provides as follows: "If it appears to the court or judge, from such petition, that it is necessary, or that it would be for the advantage, benefit and best interests of the estate and those interested therein, to sell the whole or some portion of the real estate for the purposes and reasons mentioned in the preceding section, or any of them, such petition must be filed, and an order thereupon made" directing all persons interested to appear and show cause, et cetera, at a time and place specified. Section 1542 of the Code of Civil Procedure authorizes the court to order the sale if the allegations of the petition are sustained by the proofs. Sections 1543 and 1544 relate to the same matters.

Appellant relies upon the case of *Brenham v. Story* 39 Cal. 179. (Citing, also, *Pryor v. Downey*, 50 Cal. 409; 19 Am. Rep. 656; *McNeil v. Congregational Soc.*, 66 Cal. 110; *Smith v. Olmstead*, 88 Cal. 582; 22 Am. St. Rep. 336; *Bates v. Howard*, 105 Cal. 173; and some other cases; also, 2 Woerner's American Law of Administration, secs. 469, 470.)

In *Brenham v. Story*, *supra*, an act of the legislature approved April 15, 1861 (Stats. 1861, p. 152), authorized the administrator of Charles White, deceased, "to sell at public or private sale, at his discretion, and without having first obtained an order of the probate court therefor, the whole or any portion of the real estate, or any right, title, or interest therein, claimed, held, or owned by the said Charles White, at the time of his death, as in the judgment of such ad-

ministrator will best promote the interests of those entitled to said estate." This act was amendatory of section 1 of an act approved April 6, 1860. (Stats. 1860, p. 148.) Other sections of the act of 1860 required the administrator to report the sale to the court for approval and empowered the court to act ex parte on the report, and made no provision for notice of any hearing on the report. Upon such approval of the court the administrator was authorized to make a deed. This was a special act passed after the death of the intestate. The general law then was much the same as now, and authorized the sale of real estate for the purpose of making payment of family allowance, debts of the decedent, or the debts, expenses, or charges of administration or legacies, but the general law did not then provide for a sale of real estate, there being no such charges, whenever, in the judgment of the administrator, the sale would best promote the interest of those entitled to the estate. This latter, however, was what the legislature undertook to do by special act, after the death of the ancestor. The court said: "Upon the death of the ancestor the heir becomes vested at once with the full property, subject to the liens we have mentioned (the debts, et cetera); and, subject to these liens and the temporary right of possession of the administrator, he may at once sell and dispose of the property, and has the same right to judge for himself of the relative advantages of selling or holding that any other owner has. His estate is indefeasible, except in satisfaction of these prior liens, and the legislature has no more right to order a sale of his vested interest in his inheritance, because it will be, in the estimation of the administrator and the probate judge, for his advantage, than it has to direct the sale of the property of any other person acquired in any other way." Respondent misconceives the controlling principle of the case in placing it on the fact "that in passing the act the legislature usurped judicial functions." The decision rests upon the want of power to order the sale after the title had vested in the heirs except for the purposes provided by the law in force at the death of the ancestor. In the case before us, decedent died July 10, 1891, while a resident of this state, and letters were duly issued to respondent as administrator in May, 1892. The act under which the sale was ordered and made was approved March 23, 1893. (Stats. 1893, p. 212.)

Whether the law is constitutional as applied to the property of decedents who have died since the passage of the act, is a question not presented, and need not be considered or decided. But we think the precise question here involved was decided in *Brenham v. Story*, *supra*, adversely to respondent's contention and must rule this case. The principle there laid down, that upon the death of the ancestor the heir at once becomes vested with the full property subject only to liens then existing, or created by statute then in force, has never been questioned by the court. (See *Smith v. Olmstead*, 88 Cal. 582; 22 Am. St. Rep. 336; *Bates v. Howard*, *supra*, and many other cases that might be cited.) It is true, as we are reminded by respondent, that in the *Brenham* case the court said, "the right of an heir to his inheritance depends upon positive law, and it is not a natural or an absolute right. It is competent for the legislature to change the rule of inheritance, or to restrict the testamentary power. It may provide, as it has done, that the heir or devisee shall take subject to certain burdens, as the payment of the debts," et cetera. But this is far from saying that the legislature may, as was attempted in that case, after the title had vested in the heir, empower the administrator to sell the inheritance for purposes not authorized at the time the title vested and to which it was not subject when it vested. Respondent cites Cooley's Constitutional Limitations and some cases in support of the power. These may be worthy of consideration when a case arises under the statute where the decedent has died since the enactment of the amendments, but they do not convince us of any unsoundness in the principles stated in *Brenham v. Story*, *supra*. The statute authorizing the mortgaging of estates, to which our attention is called, rests upon the principle that the mortgage provides for the payment of liens existing under the law or likely to arise thereunder.

Respondent presents reasons in support of the statute as applicable to estates where the decedent died after the passage of the law, but, as we have said, that question does not necessarily arise here and ought not to be decided until it does arise; any expression of opinion upon it now would be *obiter*.

We advise that the order be reversed.

Haynes, C., and Gray, C., concurred.

For the reasons given in the foregoing opinion the order is reversed. Garoutte, J., Van Dyke, J., Harrison, J.

[S. F. No. 912. Department Two.—July 18, 1899.]

THOMAS GRAVES, Respondent, v. J. R. HEBBRON, Appellant.

ACTION TO QUIET TITLE—BOUNDARY BETWEEN SECTIONS—FORMER JUDGMENT IN EJECTMENT.—In an action to quiet title brought by a patentee of a quarter-section of land against a patentee of adjoining land in another section, involving the location of the boundary line of the government survey between the sections, a former judgment in an action of ejectment brought by the defendant against the plaintiff, settling the location of the same boundary line in favor of the defendant, is admissible against the plaintiff as a former adjudication of the subject matter, though at the time of the trial and judgment the plaintiff was not a patentee of the quarter-section, but held a pre-emption receipt therefor.

ID.—EFFECT OF PRE-EMPTION RECEIPT—BOUNDARIES NOT AFFECTED BY PATENT.—One holding a quarter-section of surveyed government land, under a final pre-emption receipt entitling him to a patent therefor, acquires no new or greater right by his patent describing the same land described in the receipt, so far as the boundaries of his land are concerned. His final receipt is *prima facie* evidence of ownership, and is a "certificate of purchase," within the meaning of section 1925 of the Code of Civil Procedure.

ID.—CERTAINTY OF FORMER JUDGMENT—EXTRINSIC EVIDENCE.—In order to the operation of the former judgment as an estoppel, it must appear either upon the face of the record or be shown by extrinsic evidence that the precise question involved was raised and determined in the former action; and where there is uncertainty in the record of the former action of ejectment, extrinsic evidence is admissible to show that the boundary lines involved in the present action were in fact fixed and determined in the former action.

APPEAL from an order of the Superior Court of Santa Clara County denying a new trial. W. G. Lorigan, Judge.

The facts are stated in the opinion.

H. V. Morehouse, and F. J. Hambly, for Appellants.

Renison & Jones, A. S. Kittredge, and W. A. Kearney, for Respondent.

CHIPMAN, C.—Action to quiet title to a certain tract of land situated in Monterey county. Plaintiff had judgment. Defendant appeals from the order denying his motion for a new trial. The land in question is a piece of about thirteen acres which defendant claims lies in the northwest quarter of the northwest quarter of section 29, township 15, south, range 6 east, but which plaintiff contends is part of the northeast quarter of section 30 of that township. Plaintiff describes in his complaint the particular tract by metes and bounds. Defendant denied plaintiff's title and alleged title in himself. Defendant, by way of separate answer, avers that he commenced an action December 31, 1884 (entitled *Hebbron v. Graves*) against plaintiff in this action "for the recovery of the possession, claiming to be the owner thereof and seized in fee and entitled to possession of the following described land"; then follows the description of certain land lying in sections 19, 20, and 29 of said township, as to which defendant avers that the title was then involved, and also that the location of the line dividing sections 19 and 20 and sections 29 and 30, running north and south, and the location of the corner common to sections 19, 20, 29, and 30 were involved and litigated; and averring that it was admitted by Graves at the trial of said action of *Hebbron v. Graves*, that, if the boundary line between sections 19 and 20 and 29 and 30 was situated and located as claimed by Hebbron, then that Hebbron was entitled to judgment for the lands described in his complaint; that to entitle plaintiff in this action to recover "the said line running north and south between said sections 29 and 30 must be removed nearly eight chains further east than as located, fixed, and determined, adjudged and decreed by the judgment in the said suit of the said Hebbron against the said Graves, and the common corner to sections 19 and 20, 29 and 30 must be removed six and eighty-four one-hundredths chains east of where the same was located, fixed, determined, adjudged, and decreed in the said judgment of the said Hebbron against the said Graves, duly given

and made by the said superior court aforesaid"; that if the line and common corner referred to remain as determined in that action, then plaintiff in this action has no right, title, or interest in the premises sued for; averred that the defendant Graves appealed from the judgment and from the order denying new trial to the supreme court, where the judgment and order were affirmed.

Plaintiff introduced the patent of the United States, dated April 14, 1890, to the northeast quarter of section 30; a witness testified that the land in question is part of the northeast quarter of section 30. Plaintiff thereupon rested. Defendant showed title to the northwest quarter of the northwest quarter and the east half of the northwest quarter of section 29. It was stipulated that the transcript on appeal in *Hebbron v. Graves* might be offered and introduced in evidence for the same purposes and "to the same effect as the original record might be introduced, if the same were presented"; and the transcript in that case is set out in the transcript in this case. It contains the judgment-roll, statement of the case, the evidence at the first trial, the steps taken to appeal—in short, the entire record on appeal. Defendant offered the transcript, as counsel stated, for the purpose of showing that the parties were the same as here, and to show that the land involved was the same, and that the object was to settle the boundary lines between the lands of the parties, the location of the corner common to sections 19, 20, 29, and 30, and that counsel would follow up the offer by showing that the appeal was perfected and the judgment of the lower court affirmed, and that "the controversy here is precisely the same controversy as in that suit." Plaintiff objected to the judgment-roll on the ground of its immateriality, irrelevancy, and incompetency, and on the same ground objected to the admission of the statement of the case, part of the transcript; and it is now claimed by respondent that the statement is not properly part of this record, and cannot be considered because there was no distinct ruling upon both of his objections. Some discussion ensued upon the objection, in which the court took part, and counsel for plaintiff stated as follows: "Our principle objection is that it is apparent from the inspection of the record itself (the transcript) that the judgment-roll was made up and that judgment was entered long prior to the title which

we are now litigating." In ruling upon the matter the judge said, among other things: "I do not see that the judgment, as against the party not holding the title, can be availed of as against a subsequent patent from the United States government for the land. . . . The party under his patent has to go upon the ground and ascertain the stakes, and determine where his boundaries are, and the only right to put in controversy the boundaries, the survey of the United States government, exists under the patent, and any prior litigation in which that question is put in controversy, if it is decided adversely to him as to the limits of his possession under the patent, I do not think can be asserted in a subsequent action, and the offer of the judgment-roll will be denied upon that ground." It is manifest from the colloquy which ensued upon the offer, between respective counsel and the court, and the remarks of the court when the ruling was made, that the point under discussion was as stated by plaintiff's counsel and quite fully discussed by the court from which the quotations above are taken. When the court ruled out the judgment-roll it practically ruled against the whole transcript. Having excluded the judgment-roll, the statement went with it. It, perhaps, would have been well for the defendant's counsel to ask a ruling also as to the statement, inasmuch as there was a separate objection to it; but we are unwilling, in view of the circumstances as they occurred, to hold that we cannot look to the statement here as part of the offer. It appeared in evidence that, prior to the action of *Hebbron v. Graves*, Graves held the northeast quarter of section 30 by an original homestead entry, which before commencement of the action, he had commuted to a pre-emption claim and had made final payment to the government and held a final pre-emption receipt entitling him to patent. At that time Hebboron had patent to the northwest quarter of the northwest quarter of section 29, and other lands.

In support of the ruling of the court respondent relies upon *Amesti v. Castro*, 49 Cal. 325, and refers also to *Caperton v. Schmidt*, 26 Cal. 479; 85 Am. Dec. 187. In the first of these cases the question arose between two claimants of contiguous Mexican grants, title to both of which was inchoate at the time the judgment pleaded in bar was entered. In that action

the executors of Castro sued in ejectment to recover from Amesti a parcel of land, to which both claimed title under their respective grants, and Castro recovered judgment.

Subsequently, a patent was issued to Amesti which included the land recovered in the former ejectment suit. Castro's grant was also confirmed, and the survey excluded from his rancho the premises recovered in the ejectment suit. The claimants, being dissatisfied with the survey, caused the same to be returned to the district court for revision under the act of Congress and it was approved and became final. Subsequently, the heirs of Amesti commenced an action in ejectment to recover from the defendants claiming under Castro the same lands which were formerly recovered by the executors of Castro. The only defense offered was the judgment in the former action as an estoppel, in support of which the judgment-roll was offered and was excluded by the trial court, and that ruling was affirmed here. An examination of the opinion will show that the court treated Amesti's title prior to confirmation as incipient under which the question of the boundaries of his land remained undetermined, and that the duty later on of definitely fixing the boundaries rested first with the Mexican government and later, by treaty, with the United States government; and that "it alone, or its properly constituted tribunals, could adjudicate his claim, fix his boundaries, and invest him with perfect title." In *Caperton v. Schmidt, supra*, the court said: The estoppel of a verdict and judgment is necessarily limited to the rights of the parties as they exist at the time when such verdict and judgment are rendered, and cannot preclude either party from showing that their rights have been varied or extinguished at a subsequent period."

The case now here is altogether different from *Amesti v. Castro, supra*. When the parties acquired their rights the surveys had been made and the boundaries of the land had been determined by the government. Graves had a clear right to the northeast quarter of section 30, and could then go and find his land by the survey as already made, and he pre-empted the land according to this survey; and this was true as to Hebbbron's title. So far as the boundaries of his land were concerned Graves acquired no new or greater right

by his patent than he would have had under his final receipt. His final receipt was *prima facie* evidence of ownership of the land and was a "certificate of purchase" within the meaning of section 1925 of the Code of Civil Procedure. (*Witcher v. Conklin*, 84 Cal. 499.) The land as then surveyed could not thereafter be sold by the government nor thrown open to pre-emption by another. (*Witcher v. Conklin*, *supra*.) His receipt entitled him to a patent by the same description as given in the receipt, and in fact the patent so describes the land. It was held in *Byers v. Neal*, 43 Cal. 210, where judgment for the possession of a quarter section of land was rendered against one after he had proved up and paid for his land, under the pre-emption laws of the United States, and subsequent to the rendition of the judgment had received a patent for it, that the judgment was conclusive and barred his rights in a subsequent action. It may be doubted whether the learned trial judge was correct as to the question of title if that alone had been litigated, for *Byers v. Neal*, *supra*, seems to hold otherwise; but upon this point it is not necessary to express an opinion. As to the question of boundary, however, we think the court was in error in holding that, although formerly litigated and decided against him when he held only a final receipt, the pre-emptor (plaintiff) could again litigate the same issue with the same party after he had obtained his patent. And so it may be said of the remarks quoted from *Caperton v. Schmidt*, *supra*. So far as the question of boundaries is involved here, the rights of the parties are precisely the same as when the question first arose. Their rights as they then existed have not been "varied or extinguished."

It is not claimed by respondent that there was error or fraud in the original survey, nor was it claimed by him that his patent called for any land different from that described in his final receipt, nor that the land claimed in this action was different from the land claimed in the former action. The subject matter of the action and the parties were admittedly the same, and it is now contended by appellant that the location of the line between sections 19 and 20 and the corner common to sections 19, 20, 29, and 30 had to be determined in that action before the court could determine which of the parties owned the land in dispute. Manifestly, the trial court in this action so regarded the matter, but as it held that plain-

tiff was not precluded from maintaining the action, notwithstanding the former adjudication, because he had subsequently obtained a patent to his land, he held with entire consistency that the judgment-roll was immaterial and irrelevant. Indeed, any evidence tending to prove former adjudication would have been equally irrelevant if the position of the court had been correct. For like reason, the court refused to admit evidence of a witness called to prove that the land inclosed and occupied by defendant and now involved is the same land as that recovered under the former judgment as surveyed and located by the county surveyor who was a witness in the former action. While it is true, as contended by respondent, that this witness, under the statement of counsel for appellant that the evidence was offered solely to support his plea in bar, could not testify as to facts other than such as appeared at the former trial, we think the evidence offered was directed to the facts shown at that trial. The court ruled the evidence out, no doubt, because no matter what the facts then were the subsequent patent gave plaintiff a new cause of action. We think this conclusion of the court was erroneous and entitles appellant to a new trial, for it goes to the very essence of the case.

But it is urged that the judgment relied upon by defendant is uncertain, ambiguous, and indefinite, and cannot constitute an estoppel. (Citing *People v. Frank*, 28 Cal. 507; *Ferreira v. Chabot*, 63 Cal. 564.) In the latter of these cases it is said, quoting from *Russell v. Place*, 94 U. S. 606: "A judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties; but to this operation of the judgment it must appear, either upon the face of the record, or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record, the whole subject matter of the action will be at large and open to new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined."

We have carefully examined the pleadings and the judgment in the former action. It would occupy much space, we

think unnecessarily, to give the various descriptions there found. Suffice it to say that there is some uncertainty in the calls of the judgment. But looking to the pleadings in that action and the evidence found in the transcript and to the pleadings in this action, together with the offer at the trial to follow up the judgment with proof that in fact the boundary lines now involved were in the former action fixed and determined, we think the court erred in excluding the testimony. Defendant did not rely alone on the fact of the judgment, but he also relied upon the extrinsic evidence contained in the transcript and upon what he expected to show otherwise to establish the allegations of his answer. The evidence contained in the transcript in connection with the other extrinsic evidence offered was certainly admissible to show what appellant claimed was the fact; and, inasmuch as the ruling of the court not only excluded the transcript but would have excluded any and all evidence tending in the same direction, and was an erroneous ruling, we think a new trial is called for and should be granted. What may be the result of this evidence it is not our purpose to indicate.

It is advised that the order be reversed.

Britt, C., and Cooper, C., concurred.

For the reasons given in the foregoing opinion the order is reversed. Van Dyke, J., Garoutte, J., Harrison, J.

[S. F. No. 992. Department Two.—July 21, 1899.]

SANTA ROSA NATIONAL BANK, Appellant, v. J. D. BARNETT et al., Respondents.

CORPORATIONS—LIABILITY OF STOCKHOLDERS—INDEBTEDNESS TO BANK—OVER-DRAFTS—NOTE—STATUTE OF LIMITATIONS.—A corporation is liable upon an implied promise to pay over-drafts to a bank when made; and its stockholders are liable on the indebtedness thus accruing to the bank, upon the daily balances against the corporation shown by the account. A note given in renewal or extension of the indebtedness of the corporation for over-drafts cannot operate to renew or extend the liability of the stockholders, or prevent the statute of limitations from running against it.

- ID.—GENERAL DEPOSITS AFTER OVER-DRAFTS—PRESUMPTION OF PAYMENT—ACCOUNT NOT MUTUAL.**—General deposits made by the corporation in a bank to which it is indebted for over-drafts, of sums not greater than the balance of indebtedness, are presumed to be made as payments thereupon, and do not make the account mutual, open and current, within the statute of limitations. The fact that the account started with a credit cannot alter the nature of the indebtedness for over-drafts, now render the account of such indebtedness and of payments thereupon a mutual, open and current account.
- ID.—LIMITATIONS OF STOCKHOLDERS' LIABILITY—CONSTITUTIONAL LAW.**—Section 359 of the Code of Civil Procedure, limiting the liability of the stockholders of corporations, is not inconsistent with section 3 of article XII of the state constitution, imposing such liability, and was continued in force by section 1 of article XII of the constitution, continuing in force all laws not inconsistent therewith.
- ID.—CONSTRUCTION OF CODE.**—There is no conflict between section 359 of the Code of Civil Procedure and section 309 thereof, relating to the liability of directors of corporations, or section 348 thereof, relative to actions against persons and corporations with whom money has been deposited.
- ID.—AMENDMENT OF COMPLAINT—DISCRETION—RULING WITHOUT INJURY.**—The refusal of the court to allow the complaint to be amended to conform to claimed proof that the indebtedness evidenced by the note upon which the stockholders were sued was for a balance due upon a mutual, open and current account between the corporation and the plaintiff was within the discretion of the court, and the ruling will not be disturbed if no abuse of discretion appears. The ruling is without injury where the evidence shows that the cause was tried as fully as if the proposed matter of amendment had been pleaded.

APPEAL from a judgment of the Superior Court of Sonoma County and from an order denying a new trial. S. K. Dougherty, Judge.

The facts are stated in the opinion.

R. M. Swain, and Barham & Miller, for Appellant.

Thomas Rutledge, A. B. Ware and W. F. Russell, for Respondents.

CHIPMAN, C.—Action to enforce the personal liability of defendants as stockholders in Central Street Railway Company, a corporation. Defendants pleaded the statute of limitations, and upon that plea had judgment except as to the sum of \$392.49, for which plaintiff had judgment against

defendants for the proportionate share of each. Plaintiff appeals from the judgment and from an order denying motion for new trial.

The court found that defendants were stockholders of the railway company; that from and after May 28, 1891, and until December 4, 1892, plaintiff loaned and advanced the company, from time to time, large sums of money, which were used in the construction of its railroad, the purchase of material for equipment, et cetera; during this time the company made deposits of money and a balance of account was struck nearly every month, showing the amount due from the company, which balance on December 4, 1892, was \$9,607.51; on December 6, 1892, the company, by resolution, authorized its secretary and president to make and deliver its promissory note to plaintiff for the amount due plaintiff, and this note was executed December 7, 1892, for the sum of \$10,000 and delivered to plaintiff. The plaintiff thereupon, on December 7th, gave the company credit on plaintiff's books for \$325.89, that sum being the difference between the overdraft and the face of the note at the time of the credit; no other or different consideration was given for said note; that \$9,607.51 of said indebtedness was created and existed prior to December 4, 1892, and was created at different times between May 14, 1891, and December 4, 1892, and said sum was included in and made part of the sum agreed to be paid by said note of \$10,000. It is also found that this note was renewed June 7, 1894, for \$9,000, a payment of \$1,000 having been previously made by the company, and that the renewal note, which is the note set up in the complaint, included the same sums of money as did the original note of December 7th. As conclusions of law the court found that the sum of \$9,607.51, included in said note, is barred by the statute (Code Civ. Proc., secs. 338, 359); that the sum of \$392.49 was a debt created by the company at the time of making the note of December 7, 1892, and that defendants are separately liable for their proportionate share of that sum and no more. The complaint was filed December 5, 1895, one day more than three years after the balance of \$9,607.51 was found to be due plaintiff.

1. Appellant claims that the note of December 7th was in accordance with section 456 of the Civil Code, "and be-

came an executory contract and created a debt for which the stockholders became liable" (citing Const., art. XII, secs. 2, 3; *Hunt v. Ward*, 99 Cal. 615; 37 Am. St. Rep. 87); that a new debt was created by the note which became "dues of a corporation" (see constitution cited), and the statute did not begin to run until December 7th. The evidence is, that the account was opened with plaintiff by William Prindle, treasurer of the Central Street Railway Company. The pass-book used by Prindle was marked on the inside at top of first page. "Central Street Railway Company in account with the Santa Rosa National Bank, 1891," and the first entry in it is dated May 14, 1891. On the outside of the book was marked, "Treasurer of Central Street Railway Company in account with the Santa Rosa National Bank." It was shown that these indorsements were partly written by the president and partly by the cashier of the bank. It appears that the assessments against stockholders, earnings of the company, and its funds generally, went to the credit of this account, and the checks or drafts against it were generally drawn by Prindle, the treasurer, but the bank paid as checks the warrants drawn by the president and secretary of the company on the treasurer.

It is clear from the evidence that the overdraft indebtedness was treated both by the bank and the company as the indebtedness of the latter. The fact that the account was kept in the name of the treasurer did not make it his individual account in any sense, nor was it so in fact. The account shows no transactions except receipts and disbursements of money by the bank. It was an ordinary running account, such as is common with depositors in a bank. There was an implied promise on the part of the company to pay overdrafts whenever and at the time they occurred (*Pauly v. Pauly*, 107 Cal. 8; 48 Am. St. Rep. 98); and on the account, as balances accrued against the company, there was a primary liability on the part of the stockholders. Suit could have been brought upon this account upon the daily balances as shown by the account. A liability was incurred as shown by these balances, and, unless suit was brought within three years after the liability was incurred, the action was barred by section 359 of the Code of Civil Procedure. (*Hyman v. Coleman*, 82 Cal. 650; 16 Am. St. Rep. 178; *Hunt v. Ward*, *supra*.) The note of December 7th was but

a renewal or extension of the indebtedness theretofore incurred on the part of the corporation, but it was not a renewal or extension of the stockholders' liability. (*Hyman v. Coleman, supra.*) We do not think the claim made by appellant can be sustained that the account was a mutual, open, and current account within the meaning of section 344 of the Code of Civil Procedure, and that the note, when passed to the credit of the company, must be treated as the last item in the account, drawing with it all preceding items, thus starting the statute December 7th, the date of the note, for the balance appearing December 4th. General deposits, such as these were, made in a bank where the depositor is drawing against the account from time to time by checks and drafts, are to be deemed as payments of any overdraft of the depositor. Payment, whether it be of money or of personal property at a stipulated value, made on an account as a payment, and not as a setoff *pro tanto*, does not make an account mutual. (*Norton v. Larco*, 30 Cal. 126; *Adams v. Patterson*, 35 Cal. 122; *Rocca v. Klein*, 74 Cal. 526.) Where articles of merchandise have been delivered, and there is no evidence as to whether there was in fact a sale or a payment in kind, "the legal presumption is that it was a sale and not a payment in kind. It is otherwise in the case of a delivery of money. There the presumption is that it was a payment and not a loan." (Sanderson, J., in *Norton v. Larco, supra.*) The evidence shows that the railway company authorized its officers to arrange to borrow money from plaintiff; an account was opened with the bank by a small deposit in April, 1891, for the company; other deposits of considerable amount were made, but about November, 1891, the account showed an overdraft which continued to grow until the note of December 7th was given; balances were struck nearly every month showing the indebtedness of the company; deposits from time to time of small amounts were made throughout the entire period, and were credited to the company as payments, and so show on the pass-book kept by the company and in which these monthly balances were entered. The nature of the account we do not think was changed by the fact that it opened with a credit to the company. We can discover no elements of a mutual, open, and current account in the transaction.

2. It is contended that section 359 of the Code of Civil Procedure is in conflict with section 3, article XII, of the constitution of this state. It is claimed that the code section was enacted prior to the adoption of the constitution and that the latter must prevail. The constitutional provision referred to declares that "each stockholder of a corporation . . . shall be individually and personally liable for such proportion of all its debts and liabilities contracted or incurred during the time he was a stockholder," et cetera. No limitation of time is prescribed by the constitution within which actions must be brought. Section 1 or article XXI of the constitution continued in force all laws not inconsistent therewith. Section 359 does not attempt to relieve the stockholder from his liability under the constitution; it only limits the time within which the action may be brought, and this is not inconsistent with the constitutional declaration that such liability is imposed upon the stockholder.

3. It is claimed that section 359 of the Code of Civil Procedure is in conflict with sections 309 of the Civil Code and 348 of the Code of Civil Procedure. Section 309 relates to the liability of directors of corporations, and section 348 has reference only to actions against persons or corporations with whom money has been deposited. Neither of these sections refers to the liability of stockholders. This liability is declared by the constitution and by section 322 of the Civil Code. There is no conflict between these sections.

4. It is objected that the evidence does not support findings 8, 9, and 10, for the reason that the evidence shows more money to have been deposited by the company than the findings seem to imply. This may be true, for the evidence shows deposits nearly every month. Still, the evidence is that the overdraft increased steadily from about October, 1891, and even if the court failed to find as to all the deposits, it would not change the nature of the account.

5. After the evidence was closed and the cause submitted to the court and was by the court taken under advisement, and before the court had made findings, plaintiff served notice of motion "to amend the complaint to conform to the proofs made upon the trial of the said cause." The proposed amendment was to the effect that the original indebtedness

for which the promissory note of December 7th was made was for a balance due upon an open, current, and mutual account.

The evidence shows that the cause was tried upon this issue as fully as if it had been pleaded as proposed by the amendment. Even if an abuse of discretion, which we do not think it was, the ruling of the court was without injury.

I advise that the judgment and order be affirmed.

Cooper, C., and Britt, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are affirmed.

McFarland, J., Temple, J., Henshaw, J.

[S. F. No. 1949. In Bank—July 21, 1899.]

ED. E. LEAKE, Petitioner, v. E. P. COLGAN, Controller,
Respondent.

COMMISSIONER OF PUBLIC WORKS—TERMINATION OF OFFICE.—The office of commissioner of public works was abolished in March, 1899 by the terms of the amendment of 1897 to the act of 1893, creating the office.

ID.—TITLE OF AMENDATORY ACT—CONSTITUTIONAL LAW.—The fixing of the term and tenure of the office, and the duration of its existence or the abolition thereof after a fixed period, being matters germane to the subject of the original act, they may constitutionally find expression in the amendatory act without specific mention of them in the title of the amendatory act.

PETITION in the Supreme Court for a writ of mandamus to the State Controller.

The facts are stated in the opinion of the court.

Judson Brusie, for Petitioner.

Tirey L. Ford, Attorney General, and William M. Abbott,

Deputy Attorney General, for Respondent.

THE COURT.—This is a petition for a writ of mandate asking that the controller be directed to draw his warrant in

favor of petitioner as commissioner of public works, for his salary for the month of March, 1899.

In 1893 the legislature created the office of commissioner of public works, defining his duties and powers and fixing the salary, and made an appropriation to carry the purposes of the act into effect. (Stats. 1893, p. 345.) In 1897 the legislature passed an act entitled, "An act to amend an act entitled, 'An act to create a commissioner of public works, defining his duties and powers, prescribing his compensation, and making appropriation,' approved March 24, 1893, relating to the office of the commissioner of public works." Section 2 of this act is as follows: "This act and the act creating a commissioner of public works, defining his duties and powers, prescribing his compensation and making appropriation, approved March 24, 1893, relating to the office of commissioner of public works, of which this act is amendatory, shall cease, terminate, and be at an end on the first day of March, 1899, and the office of commissioner created hereunder and under said act approved March 24, 1893, and all officers and employees appointed by said commission shall cease, and their employment thereafter shall be discontinued, and the state of California shall in no manner whatever be liable for the compensation of the commissioner, officers, or employees employed by him, or by said commission, after said date." (Stats. 1897, p. 26.)

As to the meaning of this language there is not the least uncertainty. It is contended, however, that the subject matter of this section is not embraced within the title of the act, and that it is therefore void under article IV, section 24, of the constitution, which declares that an act shall embrace but one subject, which subject shall be expressed in its title, and that it shall be void as to matters not so expressed. But the fixing of the term or tenure of office, under an act such as this, or the abolition of the office, are matters embraced within, and germane to, the subject of the original act, and they may find an expression in an amendatory act without specific mention of them in the title to such amendatory act. Such is the well-settled rule based upon very obvious consideration. Reference need only be made to

Cooley's Constitutional Limitations, 6th edition, section 3, page 174, and Sutherland on Statutory Construction, section 97, *et seq.*

It is further argued that an act passed by the same legislature at a date later than the one under consideration shows a definite purpose to continue the office beyond the time expressed in the act for its determination. (Stats. 1897, p. 171.) By this last-mentioned act an auditing board for the commission of public works is created; but this amendatory act continued the office in existence for about two years, and there is nothing in the latter act to call for the conclusion that the legislature meant to do other than to regulate the affairs of the office during the remaining period of its existence.

The application for a writ is denied.

[S. F. No. 1185. Department Two.—July 21, 1899.]

In Re GEORGE STRAUT, an Insolvent Debtor.

PARTNERSHIP—INSOLVENCY OF MEMBER OF FIRM—DISTRIBUTION OF ASSETS—CONSTRUCTION OF CODE.—The provisions of section 39 of the Insolvent Act for proceedings in the case of insolvent partnerships, and the relative distribution of the firm assets, and of the individual assets of the partners, do not apply to a proceeding in insolvency in the case of an individual member of the firm, where the court has no jurisdiction over the assets of the partnership. In such case, the assets of the insolvent may be distributed *pro rata* to all of the creditors who have proved their claims, including the firm creditors.

APPEAL from orders of the Superior Court of Napa County, settling the accounts of an assignee of an insolvent debtor, and distributing the assets of the insolvent. A. J. Buckles, Judge, presiding.

The facts are stated in the opinion of the court.

F. E. Johnston, H. C. Gesford, and E. L. Webber, for Appellant.

H. M. Barstow, for Respondent.

C. J. Beerstecher, for Assignee.

TEMPLE, J.—The insolvent had been a member of a copartnership doing business under the firm name of Meigs & Straut. The firm had become heavily indebted and had ceased to do business. Some individual creditors of Straut caused him to be adjudged an insolvent debtor on the twenty-sixth day of August, 1895. In obedience to an order of the court Straut made and filed an inventory of his property, which included the assets of the copartnership. He also gave a list of his creditors, including the creditors of the firm.

The sheriff of the county was directed to take charge of the estate and a meeting of the creditors was provided for. Many creditors proved their demands. Some were only creditors of Straut, but others were creditors of the firm. An assignee was appointed and the usual assignment made. On the twenty-fourth day of July, 1897, the accounts of the assignee were settled. He had subject to distribution to creditors two thousand one hundred dollars and seventeen cents. It was distributed to all the creditors *pro rata*, including the firm creditors. This distribution was objected to by the individual creditors, who contended that they should be first paid, and that the copartnership creditors would take nothing unless there was a surplus after paying the individual creditors. The assets would suffice to pay only a small per cent of the allowed claims of the individual creditors.

The proceeds in the hands of the assignee were from individual property, except three dollars and fifty cents, which was from the partnership assets. The partnership affairs have never been settled. Whether its assets possess further value does not appear.

Section 39 of the Insolvent Act provides for the proceeding in the case of partnerships. The assets of partnership and the individual estates of the partners are taken by the assignee, and the proceeds of partnership property is to be first applied to the payment of partnership creditors, and the moneys derived from individual estates to the payment of individual debts. Either set of creditors can resort to any surplus there may be in the fund first to be appropriated to the other class. Appellant contends that this rule should prevail in this case, where only one of the partners has been adjudged insolvent, and the court has no jurisdiction over the estate

of the partnership. But the statute cannot be extended beyond the special case for which it was provided.

According to section 35 all creditors whose debts are proved and allowed may share *pro rata*, without a preference, except as provided in section 1204 of the Code of Civil Procedure, in regard to claims of servants and others.

By section 41 all debts due or to become due may be proved against the estate. Each partner owes all the debts of the partnership, and his goods may be taken to pay them. He may become insolvent through the indebtedness of the partnership, and in the case of his individual insolvency, his creditors may undoubtedly have recourse to his interest in the partnership assets. Of course, his interest would be taken subject to the prior rights of partnership creditors, and to the expense of settling the affairs of the partnership. As the partnership debts can be proved against the estate, a discharge must have the effect of relieving his separate estate from all liability for partnership debts. The partnership might not be insolvent, but the insolvency of an individual partner would necessitate a dissolution, and an assignee could insist upon a liquidation and obtain for the creditors of the individual the value of the insolvent's interest in its assets. In this mode, perhaps, the assignee could cause the partnership assets to be applied to the payment of partnership debts before such creditors could have recourse to the individual estate. But as the statute now stands the court cannot discriminate in distributing the funds of the estate.

The orders are affirmed.

McFarland, J., and Henshaw, J., concurred.

[S. F. 1321. In Bank.—July 21, 1899.]

In the Matter of the Estate of THOMAS DONNELLY, Deceased. CHARLES J. STILWELL, Appellant.

ESTATES OF DECEASED PERSONS—RIGHT OF INHERITANCE—CIVIL DEATH—IMPRISONMENT FOR LIFE.—The right of inheritance is a civil right, existing only by virtue of the law, and the legislature may
CXXV. CAL.—27.

make the deprivation of this right a portion of the penalty to be imposed for the commission of a crime. Section 674 of the Penal Code, enacting that "a person sentenced to imprisonment in the state prison for life is thereafter deemed civilly dead," has the effect to extinguish his civil rights, generally, including the right of inheritance; and such a person cannot be a distributee of the estate of an intestate father who died subsequent to his sentence of imprisonment for life.

Id.—CONSTRUCTION OF CODE—EXCEPTIONS NAMED EXCLUSIVE.—The exceptions named in sections 675 and 676 of the Penal Code are exclusive, and the civil death of the felon destroys every civil right not expressly saved in those sections.

APPEAL from a decree of the Superior Court of the City and County of San Francisco distributing the estate of a deceased person. J. V. Coffey, Judge.

The facts are stated in the opinion of the court.

Crittenden Thornton, and Thornton & Merzbach, for Appellant.

Timothy J. Lyons, for Respondent E. J. LeBreton.

Edward C. Harrison, for Respondent, C. H. Athearn.

Alexander D. Keyes, Dunne & McPike, T. J. Crowley, and Humphreys & Morrow, for other Respondents.

HARRISON, J.—Thomas Donnelly died intestate February 17, 1896, and on December 3, 1897, the superior court made a decree distributing his estate to his widow and the successors in interest of three of his children. The decedent left surviving him another child, James J. Donnelly, who, prior to his father's death, viz., October 5, 1894, was sentenced to imprisonment in the state prison of the state of California for the term of his natural life, and who at the time of his father's death and at the date of the said decree of distribution was in confinement therein under such sentence. February 11, 1897, James made an assignment and transfer of his interest in the estate of his father to Charles J. Stilwell, who, by virtue thereof, claimed to have a portion of the estate of the decedent distributed to him. The court denied his claim and distributed the estate as above stated. From this decree of distribution Stilwell has appealed.

Section 674 of the Penal Code is as follows: "A person sentenced to imprisonment in the state prison for life is thereafter deemed civilly dead."

Civil death imports a deprivation of all rights whose exercise or enjoyment depends upon some provision of positive law. In Anderson's Law Dictionary civil death is defined to be: "Extinction of civil rights." Bouvier says: "Civil death is the state of a person who, though possessing natural life, has lost all his civil rights and as to them is considered as dead." Abbott defines civil death to be: "The legal privation or extinction of a person's rights and capacities among his fellow members of society." In *Estate of Nerac*, 35 Cal. 392, 95 Am. Dec. 111, the court said: "If the convict be sentenced for life he becomes *civiliter mortuus*, or dead in law, in respect to his estate, as if he was dead in fact."

If James had died a natural death at the time he was sentenced to imprisonment in the state prison for the term of his natural life the correctness of the decree would be unquestioned, and for the purpose of any right of inheritance his civil death must have the same effect. The right of inheritance is a civil right existing only by virtue of the law, and the legislature may make the deprivation of this right a portion of the penalty to be imposed for the commission of a crime.

The provisions of sections 675 and 676 of the Penal Code, instead of impairing this construction given to section 674, strengthen it by showing that but for these provisions, in the opinion of the legislature, the civil death of the felon would extend to the cases therein named; and the enumeration of the cases wherein section 674 is inoperative authorizes the conclusion that those are the only cases in which it is not to be applied.

Avery v. Everett, 110 N. Y. 317, 6 Am. St. Rep. 368, cited by the appellant, has no application to the facts of the present case. In that case the testator died in 1869, leaving to his son, Charles, an estate in the lands in question, which the court held to be a vested remainder in fee, limited upon the life of his mother, but subject to be defeated by his dying without children. This remainder was property capable of being transferred by Charles, and vested in him at the death

of his father. In 1875 Charles was convicted of murder and sentenced to imprisonment in the state prison for the term of his natural life. The court was not called upon to consider whether his right of inheritance was destroyed by the sentence, but whether the sentence operated to divest him of the property at that time owned by him, and held that the sentence did not have the effect to divest him of his interest in the land. The same rule exists in this state by virtue of section 677 of the Penal Code, which provides: "No conviction of any person for crime works any forfeiture of any property, except in cases in which a forfeiture is expressly imposed by law."

The decree is affirmed.

Garoutte, J., Van Dyke, J., McFarland, J., Temple, J., and Henshaw, J., concurred.

[L. A. No. 289. In Bank.—July 21, 1899.]

CITY OF LOS ANGELES, Respondent, v. A. E. POMEROY et al., Appellants.

EASEMENT FOR DITCH—ADVERSE USER—CESSATION OF USE.—An easement for a ditch acquired by adverse user is lost and extinguished by complete disuse for the period prescribed for acquiring title by prescription.

ID.—PATENT TO SUCCESSORS OF MEXICAN GRANTEE—FREEDOM FROM LEGAL EASEMENT—EQUITY.—A United States patent issued without reservation to the successors of a Mexican grantee, to whom the whole rancho was conveyed without reservation, does not inure to any person claiming under a grant of an easement of a ditch from the original grantee; but the patentee acquired the whole legal title free of every sort of legal servitude. The grantee of such easement has at most a mere equity, which must be alleged and proved as such.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order denying a new trial. Lucien Shaw, Judge.

The facts are stated in the opinion of the court.

R. H. F. Variel, and J. S. Chapman, for Appellants.

William E. Dunn, for Respondent.

BEATTY, C. J.—This is a suit to enjoin the defendants from interfering with a certain dam and ditch by means of which the plaintiff diverts water from the Los Angeles river for the use of its inhabitants and for domestic purposes. The dam and ditch in question are situated upon a part of the Providencia rancho which belongs to the defendants, and the question is whether the city has the right to maintain them. The cause was tried in the superior court without a jury, the facts found in favor of the plaintiff, and judgment entered accordingly. The defendants appeal from the judgment and from an order denying a new trial.

The following is a general outline of the case presented by the record. The Los Angeles river flows through the city of Los Angeles, which has succeeded to the rights of the former pueblo in respect to the waters of the river. Above the city is the Los Feliz rancho, and above that the Providencia. The Providencia was granted by the Mexican authorities to Vicente de la Osa in 1843. In 1845 De la Osa made a grant, in the form usually employed at that time, to Maria Ignacia Verdugo de Feliz, her heirs and successors, of "the right to open a *zanja* over my said land and to use of the water of the river to irrigate the lands of the potrero known as that of the Feliz, or place of San Jose, for fifty dollars, which he has received to his satisfaction," et cetera. This instrument appears to have been inscribed, according to the Mexican practice, in a book of public records—an authenticated copy being delivered to the grantee—but it was never recorded in the county records of Los Angeles until 1868. In the meantime, in 1849, De la Osa had granted and conveyed the Providencia without reservation to Alexander and Mellus, who in 1852 petitioned for a confirmation of the grant. Upon their petition the grant was confirmed, and in 1872 a patent was issued to them. By various mesne conveyances the defendants have acquired the title of Alexander and Mellus.

The successors of Verdugo Feliz in the ownership of the Feliz rancho and their tenants are shown to have been in possession of an irrigating ditch as early as 1855, through which they diverted water from the river at or very near the point where the dam in controversy here is situated. How long before 1855, if at all, that old ditch had been opened and used there is nothing to show. Nor is there anything.

aside from a highly reasonable presumption, to show that it was opened in pursuance of the grant or license from De la Osa, above quoted. It is very satisfactorily proved, however, that from 1855 to 1868 the tenants of the Feliz rancho continually maintained their dam and ditch, and diverted a sufficient quantity of the waters of the river to irrigate so much of the potrero of the Feliz ranch as lay under the ditch. As to the extent of the potrero, the only evidence offered was that of plaintiff, to the effect that it contained in all five hundred acres, of which only three hundred and twenty-four acres were under ditch, *i. e.*, so situated as to be irrigable from that source. There is no evidence as to the quantity of water required for the irrigation of those three hundred and twenty-four acres.

In 1868, the successors of Verdugo Feliz conveyed the potrero of the Feliz with its appurtenances, to Howard, but without any special mention of the ditch or any water right or easements in the Providencia. Later in the same year, Howard granted, bargained and sold to the Canal and Reservoir Company, a corporation, its successors and assigns, "the right and privilege to use that certain *zanja* or irrigating ditch or canal, through which water is taken from the river Los Angeles and conveyed in and upon that portion of the Feliz ranch heretofore conveyed . . . together with all the easements and rights thereto appertaining and the right of way over and through said Feliz ranch . . . as also the ranch Providencia; . . . always provided that the said party of the first part, his heirs, executors, or assigns, have and do hereby especially reserve, the right to take and extract all the water from the said *zanja*, or irrigating canal, that is or may be necessary for the irrigation and domestic purposes, benefit, and uses of the said afore-referred to portion of the Feliz ranch, at such time and in such manner and for such places as the said party of the first part, his heirs, executors, et cetera, may deem proper." Under this grant or license the Canal and Reservoir Company took charge and control of the ditch, enlarged and extended it, and conducted water to the city of Los Angeles until 1872, when the executed a lease of the entire canal to the city for a term of thirty months, with an option to the city to purchase within

the term the leased property for a stipulated price. Under this lease the city took charge and control of the entire works, from the dam on the Providencia all the way down, and so remained until 1886. The city did not, however, avail itself of its option to purchase within the term of its lease, which expired in December, 1874, but remained in possession without objection on the part of the Canal and Reservoir Company, and without paying rent—no rent being reserved in the lease, or mentioned in any way, except the nominal sum of one dollar for the entire term of thirty months. In 1877, and from time to time, the city enlarged the capacity of the ditch so that it carried, in 1878, about thirty cubic feet per second—equivalent to about fifteen hundred inches constant flow under four-inch pressure. What the original capacity of the ditch was is quite uncertain. The superior court found, upon evidence that seems to me very shadowy and untrustworthy, that it was fifteen cubic feet per second, and based its decree on that finding. I think eight cubic feet per second, or four hundred inches constant flow, would be nearer the mark, and that indeed is all that the plaintiff claims in its complaint. In 1878, the Canal and Reservoir Company conveyed to the city all that part of its ditch, et cetera, situated within the corporate limits of the city, but no change in the use of management of the ditch or any part of it took place in consequence of this conveyance. The city continued thereafter, as before, to use the whole line of ditch for the supply of water to its inhabitants without objection on the part of the Canal and Reservoir Company. About this time, however—that is to say, in 1877 or in 1878—the city abandoned the use of that part of the ditch situated on the Providencia ranch, and made a new diversion at a point lower down, where a pile dam was constructed, for the purpose of turning the water into the new ditch. This change in the place of diversion continued until the year 1891, a period of thirteen or fourteen years, during which time that part of the old ditch situated on the Providencia ranch grew up with willows and weeds and fell into a state of general dilapidation. The dam at the head and six or eight hundred feet of the upper end of the ditch were entirely obliterated.

Pending this change in the point of diversion—in the year 1886—the city entered into a contract with the Citizens'

Water Company, a corporation, whereby that company agreed, in consideration of the use of twenty inches of the city's water, to convey through its pipes all the water required by the city for public purposes within the district covered by its system. As the water company, under this contract, drew its supply from the Canal and Reservoir Company's ditch, the city seems to have left to it the task and responsibility of keeping the ditch in order at all times, except when a large quantity of water was required for irrigation. Matters being in this posture in the winter of 1889-90, the water company found it impracticable to obtain a supply of water at the pile dam on account of the damage caused by an extraordinary freshet in the river, and proceeded to open a new ditch connecting with a new dam on the lower end of the Providencia rancho. At that date the title to this portion of the Providencia rancho, derived from De la Osa through Alexander and Mellus, was vested in the Providencia Company, a corporation, the immediate predecessor of the defendants, and the officers of that company promptly contested the right of the water company to open a ditch or divert water on their land. The city authorities were notified of the controversy, but they seem to have given the matter no attention, and the result was that the water company and the Providencia Company agreed upon a *modus vivendi* pending the determination of their respective rights. The substance of their agreement was a permission by the Providencia Company to maintain the ditch and divert the water on its land as long as the water company continued to pay five dollars a day for the privilege—the arrangement being terminable upon sixty days' written notice by either party. In pursuance of this agreement the water company reopened the old ditch originally used by the tenants of the potrero of the Feliz from 1855 to 1868, as above stated, and made a diversion of water by means of a dam located at or very near the site of the original dam—the only material difference being that the ditch was enlarged and a much greater quantity of water diverted.

Pending this arrangement, the defendants purchased the Providencia rancho, and thereafter permitted the diversion of the water under the agreement until August, 1893, when it was terminated by written notice from the water company. Upon the termination of the agreement and the refusal of the

water company or the city to make any further payment thereunder, the defendants turned the water from the ditch back into the natural channel of the river by opening a gate therein just below the dam.

Thereupon this action was commenced, in which the superior court has found that the city has a right to maintain its dam and ditch with a capacity of fifteen cubic feet per second—equivalent to seven hundred and fifty inches constant flow—on the hands of the defendants, and has enjoined them from obstructing or interfering with the city in the exercise of such rights.

The defendants, in support of their appeal from the order denying their motion for a new trial, contend that the findings of the superior court are contrary to the evidence, and the specific question to be determined is whether the city has proved a title by grant or prescription to the easement which it claims in the Providencia rancho.

The right of the city to so much of the water flowing in the river at any point above the city limits as it may require for public purposes or for the use of its inhabitants is established by the decision in the case of *Los Angeles v. Pomeroy*, 124 Cal. 597, but this right in the waters of the river does not include the right to maintain dams or ditches upon the lands of upper riparian proprietors for the purpose of effecting a diversion of the water, and to maintain this action the city, like any other litigant, must show a good title to the easement which it claims. In this case there seems to have been an attempt on the part of the city to assert a prescriptive title founded upon adverse user of the ditch and dam in question, but this claim was disallowed by the superior court upon the unquestionable ground that the complete disuse of the old dam and all that part of the ditch within boundaries of the Providencia rancho from 1878 to 1890 extinguished any servitude that might otherwise have existed. (Civ. Code, sec. 811, subd. 4.)

The only other claim of title which the city can make is through the deed of 1845 from De la Osa to Verdugo Feliz, granting the right to divert water on the Providencia rancho sufficient to irrigate the potrero of the Feliz rancho. Unless the city has deraigned a good title from that source, the

findings of the superior court cannot be sustained. In my opinion, there are more fatal defects than one in this title.

In the first place, De la Osa Granted only the right to a ditch and flow of water sufficient for the irrigation of the potrero of the Feliz, and, conceding that this right was vested in Howard at the date of his conveyance to the Canal and Reservoir Company in 1868, he by that conveyance reserved it all himself, so that nothing could have passed to the Canal and Reservoir Company except such rights over and above that granted by De la Osa as Howard and his predecessors may have acquired by adverse user, and all such rights, it is conceded, have been lost to the city by cesser of the use. This, however, is not conclusive of the controversy here, for if the city, as successor of the Canal and Reservoir Company, has the right to maintain the ditch and dam, it does not concern the defendants what may be the respective rights of the city and the successors of Howard in the potrero of the Feliz to the use of the water lawfully diverted. To conclude the city on this point it would, therefore, be necessary to decide in favor of the defendants the much debated question as to the character of the city's tenancy under the lease from the Canal and Reservoir Company, and whether it is still subsisting. In view of our conclusions upon the point next to be considered, we find it unnecessary to determine this question.

The grant from De la Osa, under which the city claims, was made in 1845. In 1849 he conveyed the whole rancho without reservation to Alexander and Mellus, who subsequently petitioned for its confirmation. It was confirmed and patented to them without reservation in 1872. The title thus conveyed to them did not inure to any person claiming under a grant from the original grantee. As against Verdugo Feliz and her successors Alexander and Mellus acquired the whole legal title to the rancho free of every sort of servitude. At most, she and her successors had an equity which, so far as appears, has never been established or asserted, and has certainly not been alleged or proven in this action. The authorities supporting this view are numerous and uniform. (See *McDonald v. McCoy*, 121 Cal. 55, and authorities cited at 66, 67; *Hartley v. Brown*, 46 Cal. 202, and authorities there cited.)

The title of the city to the easement claimed, therefore, wholly fails, and for this reason the order and judgment of the superior court must be reversed.

It would also be necessary to reverse the order appealed from upon the ground that there is no evidence that it would require fifteen cubic feet per second to irrigate the potrero of the Feliz.

The judgment and order appealed from are reversed and cause remanded.

McFarland, J., Garoutte, J., Temple, J., Henshaw, J., and Harrison, J., concurred.

[Sac. No. 1054. Department Two.—July 22, 1899.]

MARY A. BENNALLACK, Plaintiff, v. W. G. RICHARDS
et al., Respondents. SAMUEL GRANGER, Appellant.

ESTATES OF DECEASED PERSONS—SALE UNDER WILL—QUIETING TITLE—CROSS-COMPLAINT—ACCOUNTING—RECEIVER.—In an action to quiet title against the executors and heirs of a deceased person, brought by a successor in interest of a purchaser who received possession under a sale of real estate and deed thereof made by the executors, pursuant to a power in the will to sell and convey without any order of court, the executors cannot, while their disputed title and right of possession are undetermined, maintain a cross-complaint in equity against the plaintiff and the purchaser, for an accounting of the rents and profits, and for the appointment of a receiver.

ID.—VALIDITY OF SALE—DUTY OF EXECUTORS TO REPORT FOR CONFIRMATION.—The executors having made a valid contract of sale under the will so far as they were able to find them set up, were in duty bound to report it to the court for confirmation, which may be done at any time after the sale; and they cannot attack the validity of the sale, unless, after report thereof, the court refuses to confirm it.

ID.—ESTOPPEL OF EXECUTORS.—The executors, having placed the purchaser in possession under the sale and deed made by them, and permitted him to make large improvements thereon, cannot, while refusing to report the sale to the court for confirmation, invoke the aid of a court of equity to compel an accounting of rents and profits or to place the property in the hands of a receiver.

APPEAL from an order of the Superior Court of Nevada County appointing a receiver. F. T. Nilon, Judge.

The facts are stated in the opinion.

A. D. Mason, for Appellant.

C. W. Kitts, J. M. Walling, and P. F. Simonds, for Respondents.

HAYNES, C.—Appeal by Samuel Granger from an order appointing a receiver. Mary A. Bennallack, in March, 1895, commenced an action in the superior court of Nevada county against William G. Richards, Francis S. Richards and James Bennallack, as executors of the last will of Philip Richards, deceased, and William G. Richards, Francis S. Richards, and William S. Richards, personally, to quiet her title to lot 28 in block 30, in Nevada City.

A sufficient statement of facts may be made without attempting a synopsis of each different pleading. Philip Richards, in May, 1887, died testate, seised of said lot. His will was duly probated, and William G. Richards, Francis S. Richards, and James Bennallack, who were nominated therein as executors, were appointed and qualified as such. Certain legacies or "money bequests" were made in the will, and the testator's brothers, Francis S. and William S. Richards, were named as residuary legatees.

The will directed that no part of the estate be sold until two years after the testator's death; that in the meantime the executors should collect the rents, and after paying taxes, et cetera, the remainder should be applied to the payment of said "money bequests." The will further provided: "After the expiration of two years from my decease, my said executors are hereby empowered to sell at public or private sale any portion of my estate, real or personal, to such persons, on such terms, and for such sums as they deem advisable; and all this to do and perform without any order of court whatever, and also to make, execute, and deliver any and all deeds, bills of sale, or other conveyances necessary to dispose of said estate and convert the same into money, without any order of the court, or being required to account to any court."

The lot in question was duly appraised at three thousand dollars in April, 1891, and on May 11, 1891, was sold by the executors under the power given them by the will, to Samuel Granger for the sum of three thousand three hundred and sixty-five dollars; but the sale was not then reported to or confirmed by the court, but the executors, supposing that the will gave them power to convey without a confirmation of the sale, at once executed to the purchaser a deed for said lot, received the purchase money and distributed it to the legatees under an order of the court, and the purchaser was put in possession.

In a cross-complaint filed by Francis S. Richards, one of the executors, it is alleged that said sale was never confirmed by the court, nor any order for conveyance; that Granger entered into possession of the lot on May 11, 1891, and remained in possession until February 9, 1893, and during that time received rents to the amount of five hundred dollars over and above all expenditures thereon; that on May 16, 1891, "Granger assigned to James Bennallack, in trust for the benefit of Mary A. Bennallack, his interest in said lot for the sum of three thousand five hundred dollars," of which he then received three thousand dollars, and the remainder he received from rents collected between that date and February 9, 1893, when he conveyed the lot to said Mary A Bennallack, who then went into and remained in possession of the property and appropriated the rents until May 8, 1897, when she sold and conveyed the lot to Granger for the sum of three thousand five hundred dollars," and that Granger has ever since been in possession and received a rental of one hundred and six dollars per month; that in 1894 Francis S. Richards conveyed to James Bennallack all interest as residuary legatee in said lot, and Bennallack conveyed said interest to Granger on May 8, 1897.

Said cross-complaint further alleged that about the sum of one thousand dollars remains unpaid upon the legacies; that there is not sufficient money in the hands of the executors to pay the same; that said sum of three thousand three hundred and sixty-five dollars (the original purchase money paid for said lot by Granger) was paid to legatees in 1891, by order of the court, in part payment of legacies; that during their

said possession of said lot said Granger and Mary A. Bennallack each made valuable and necessary improvements, repairs, and expenditures thereon, the value of which he does not know; alleges that they are trustees of the rents for the benefit of the estate; that an accounting is necessary, and that said Granger is a necessary party, and offered, as such executor, to make such restitution to Samuel Granger and Mary A. Bennallack as the court should direct.

The prayer is that Granger be brought in and made a party; that he and said Mary A. Bennallack be credited with the amount for which the property was sold to Granger on May 11, 1891, viz., three thousand three hundred and sixty-five dollars; also with the amounts paid by them for necessary repairs, taxes, and insurance, and charged with the amount received by them for rents, the balance to bear interest at seven per centum per annum, with annual rests.

The answer to said cross-complaint alleged that said sale and deed had been duly confirmed by order and decree of the court duly made and entered on February 19, 1895; and, after denials as to the amount of rents received, they set out particularly the repairs and improvements made upon the property, amounting to three thousand five hundred dollars, and alleged the payment of taxes amounting to about three hundred dollars, and denied that they or either of them now or ever was trustees of the rents for the estate, or ever occupied any fiduciary relation to it. This answer was filed December 29, 1897.

On March 28, 1898, W. G. Richards, as executor, served notice of a motion for the appointment of a receiver, which notice stated that it would be based upon the affidavit accompanying the notice, and the judgment-roll in the case of *Granger v. Richards et al.*, No.—— in said court, the papers in this case, and the decision of the supreme court on the appeal heretofore prosecuted herein.

Said affidavit alleged that said estate owned said lot; that the monthly rental is one hundred and six dollars; and attacked appellants financial responsibility.

Granger filed a counter-affidavit alleging his ownership of the lot, denying that he is irresponsible, and alleging that he owns other and known visible property in this state of great value. On May 24, 1898, a receiver was appointed,

and this appeal is from the order making said appointment.

The judgment-roll referred to in said notice of motion is not set out in the transcript, nor any intimation of its purport given. The reference to the decision of this court does not give the title of the case, nor refer to any question of law or fact decided in it. We must assume, therefore, that neither were used on the hearing to sustain any allegation of fact. The original complaint (filed by Mary A Bennallack in 1895) was stricken out on motion of defendants.

Bennallack, one of the executors, died in November, 1897. Francis S. Richards, the other surviving executor, was not made a party, either plaintiff or defendant, to the cross-complaint, though he was served with it, and his default entered for not answering.

No case was made for the appointment of a receiver. Appellant, Granger, was brought into the case by the cross-complaint, and no relief was sought against him other than an accounting for the rents and profits. The title was put in issue apparently for no other purpose than for an accounting. Appellant is in possession, but the action is not in form for the recovery of possession but solely for an accounting.

Respondents are certainly not entitled to an accounting until their title and right of possession are determined. Appellant's answer to the cross-complaint denies that the estate has title, and alleges title in himself. It is evident that without the adjudication of that question in favor of the executors they cannot be entitled to recover the rents and profits, and if the legal title is in the estate the executors may recover possession in an action of ejectment. The principle question, therefore, is one of legal and not of equitable cognizance.

High on Receivers, section 557, lays down the rule thus: "Whenever the contest is simply a question of disputed title to the property, plaintiff asserting a legal title in himself, against a defendant in possession and receiving the rents and profits under claim of legal title, equity refuses to lend its extraordinary aid by interposing a receiver, just as it refuses an injunction under similar circumstances, leaving the plaintiff to assert his title in the ordinary forms of procedure at law. . . . A departure from the rule can only be justified upon strong grounds of judicial necessity, or in case of fraud clearly proven, or of imminent danger unless

immediately possession in taken by the court, and the burden rests upon complaint to make out a clear case to justify the relief."

There can be no question that the executors had ample power and authority under the will to make a valid sale; but confirmation of the sale by the court was necessary to authorize a conveyance (Code Civ. Proc., sec. 1561) and to vest the title in the purchaser.

The cross-complaint alleges that the sale was never confirmed by the court, but does not allege that the sale reported to the court and that confirmation was refused, or the sale vacated. That there was a valid contract of sale between the executors and the purchaser, subject only to confirmation by the court, I think is clearly shown by the cross-complaint, and one term provision of that contract was supplied by the statute, viz., that they would report the sale to the court for confirmation. This court has said (*In re Pearsons*, 98 Cal. 603, 612): "The purchaser from an executor at a sale under a power in the will deals with him in making the purchase as he would with any other vendor. He makes the purchase subject to a confirmation by the court, but in all other respects he may incorporate in his contract of purchase the same terms and conditions as he would in dealing with any other agent for the sale of property, and he can repudiate his contract of purchase only for the same reasons as he could in case he had bought from another. . . . In this state it is essential that the will shall have been admitted to probate before the power can have any validity but in all other respects the contract of purchase and sale between the executor and his vendee is attended with the same incidents and is to receive the same construction as a similar contract between any other vendor and vendee. Prior to 1861 a sale by an executor under a power in the will was valid without any confirmation by the court. In that year the legislature amended the procedure so as to require that such sales should be confirmed by the probate court, the same as those made under its own order. The confirmation thus required is, however, for the protection of the estate, and for the purpose of determining whether the sale shall be confirmed. The scope of investigation by the court is limited to ascertaining whether the sale was legally made and fairly conducted,

and the sum bid was not disproportionate to the value of the property sold, and that a sum exceeding such a bid at least ten per cent, exclusive of the expense of a new sale, cannot be obtained. (Code Civ. Proc., sec. 1554.) If any of these facts exist, the court is authorized to vacate the former sale (Estate of Durham, 49 Cal. 490); but unless such facts are shown to the court, the court must make an order confirming the sale. (Code Civ. Proc., sec. 1554.)”

In making this sale the executors exercised and exhausted their power to deal with the property unless upon reporting the sale to the court confirmation of the sale was refused. It certainly cannot be true that executors acting under such a power may make a valid and unimpeachable contract of sale to appellant, refuse to report it to the court for confirmation in violation of a duty imposed upon them by law, and having put him in possession and permitted him to make improvements to an amount nearly or quite equal to the value of the property at the time the contract of sale was made, invoke the powers of a court of equity to compel an accounting for the rents received, doubtless largely increased by the improvements made, and have a receiver appointed to collect and retain them, to be disposed of by some future order of the court. “He who seeks the appointment of a receiver must himself come into court with clean hands.” (High on Receivers, sec. 7.) The statute does not limit the time within which the executors may report the sale for confirmation. “The executor or administrator, after making any sale of real estate, must make a return of his proceedings to the court, which must be filed in the office of the clerk, at any time subsequent to the sale.” (Code Civ. Proc., sec. 1552.) The duty and power to report the sale of said lot to the court for confirmation, therefore, remained and existed at the time this cross-complaint was filed, and as the fact that the sale had been made was called to the attention of the court by the allegations therein made by the executor, he might with propriety have been cited to discharge that duty by making such report. Until that is done we see no ground upon which the executors can invoke the aid of a court of equity to compel an accounting or to place the prop-

erty in the hands of a receiver. I therefore advise that the order appointing a receiver be reversed.

Chimpan, C., and Gray, C., concurred.

For the reason given in the foregoing opinion the order appointing a receiver is reversed.

McFarland, J., Henshaw, J., Temple, J.

[S. F. No. 761. In Bank.—July 22, 1899.]

LIVERPOOL, LONDON AND GLOBE INSURANCE
COMPANY, Respondent, v. SOUTHERN PACIFIC
COMPANY, Appellant.

NEGLIGENCE—DEFECTIVE SPARK-ARRESTER—SUBROGATION OF FIRE INSURANCE COMPANY.—A fire insurance company which has been compelled to pay insurance upon premises destroyed by fire caused by a defective spark-arrester upon an engine, may, by subrogation to the rights of the owner of the premises, compel the railroad company to reimburse it for the amount of such payment if there was no contributory negligence upon the part of the owner.

ID.—CONTRIBUTORY NEGLIGENCE—USE OF REASONABLE PRECAUTIONS BY OWNER—QUESTION FOR JURY.—Where it appears that the owner of the burned premises did not directly know that the engine used was dangerous, and did not invite the use of that particular engine, and used counter-precautions against the risk of fire by employing a man to watch and guard against the danger, the question whether those precautions were such as reasonable care would dictate is for the jury.

ID.—DEBATABLE QUESTION OF PRUDENCE.—If it is fairly debatable whether or not the owner of the premises acted with ordinary prudence, in the light of the knowledge possessed, the question of contributory negligence is not determined by the result, but is one of fact for the jury.

ID.—RELATION OF ACTS TO REQUIRED CARE.—The question whether acts of the owner came up to or fell short of the degree of care required of him by law, is one of fact for the jury.

ID.—HYPOTHETICAL INSTRUCTION AS TO ORIGIN OF FIRE—PROVINCE OF JURY.—Where the evidence as to the cause and origin of the fire was circumstantial, an instruction grouping the facts in hypothetical form, and telling the jury that if they believe these facts to be established by the evidence, a *prima facie* case is made out which would warrant the jury in finding that the engine of the defendant caused the fire, does not invade the province of the jury, and is not argumentative or unfair.

ID.—INSTRUCTION AS TO PROBABILITY OF ORIGIN.—A portion of such instruction that "if, upon the whole evidence, and taking into

consideration all the conditions and circumstances surrounding the fire, you find it to be more probable that the fire was caused by sparks escaping from the swing engine than from any other cause, your finding upon that point, to wit, the origin of the fire, should be accordingly," does not throw the question into the domain of conjecture and surmise; but the question as to the probability of the origin of the fire is properly left to the jury to determine from the circumstantial evidence.

ID.—INSTRUCTION AS TO COUNTER-PRECAUTIONS—ASSUMPTION OF UNDISPUTED FACT.—Where the court properly left it to the jury to determine the reasonable sufficiency of the counter-precautions used by the owner of the property, the assumption in the instruction to the jury of the undisputed fact that counter-precautions were used, is not objectionable, and could not injure the defendant.

ID.—EVIDENCE—PROOFS OF LOSS.—The proofs of loss made by the owner of the insured buildings which were destroyed by fire were admissible in evidence for the limited purpose of establishing the liability of the insurance company plaintiff to such owner for the moneys paid upon the insurance, for which reimbursement was claimed from the defendant.

ID.—STIPULATION—OFFER OF DEFENDANT—INSTRUCTION.—The admission in evidence of a stipulation between the parties, which upon its face is made admissible in evidence, and which contained a declaration that defendant had offered to pay the owner of the premises a large sum in addition to the insurance money, is not prejudicial to the defendant, where the court instructed the jury, at defendant's request, that said offer was of itself neither an admission that the defendant had been guilty of negligence, nor that it had caused the fire, nor that anything was due to the owner of the premises, or the plaintiff, by reason of the fire.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. William R. Daingerfield, Judge.

The facts are stated in the opinion of the court.

Reddy, Campbell & Metson, and William F. Herrin, for Appellant.

Van Ness & Redman, for Respondent.

HENSHAW, J.—Appeals from the judgment and from the order denying the defendant a new trial.

On July 15, 1893, the Sierra Ice Company was the owner of certain icehouses situated in Nevada county. Upon that day three of its houses, which were insured with plaintiff for fifteen thousand dollars, were totally destroyed by fire. The

ice company presented its claim of loss for forty-four thousand dollars. The plaintiff paid the full amount of insurance, and after payment, being subrogated to the ice company, made demand upon the Southern Pacific Company for reimbursement, contending that the fire had been negligently set by the Southern Pacific Company in operating one of its locomotive engines. The Southern Pacific Company denied all responsibility for the fire, and refused payment. Plaintiff requested the ice company to join with it in an action against the Southern Pacific Company for a recovery. The ice company refused to do so, and was made a defendant in this action. During the trial of the action, however, the ice company, by stipulation of the parties, was dismissed from the case. The verdict and judgment were for the plaintiff.

The three icehouses which were destroyed were situated about a quarter of a mile from the main track of the railroad company. A sidetrack was run upon the premises of the ice company by the railroad company at the expense of the ice company. It was built for the convenient transportation of freight to and from the ice company's works. The engines and cars belonged to the railroad company, and were operated exclusively by it. The icehouse which first caught fire stood close to the track, so that ice might be readily loaded from it upon the cars. Upon the day of the fire the railroad company was engaged in removing certain cars which had been loaded with ice from this icehouse. In so doing the train men made a "flying switch." In making this switch the engine was started suddenly forward, pulling one of the cars away from the others and running with it on one track, leaving the other cars to follow more slowly behind and take another track after the engine and first car had passed. After the engine had made this sudden start in front of the icehouse, and had run some distance down the track, a fire was observed on the roof of the icehouse, just above the eaves, and exactly opposite where the engine had made its start. From these facts and from others which appear in the case, and which will be set forth as occasion may require, plaintiff contends that the evidence sufficiently establishes that the fire was caused by the sparks discharged

from the engine and falling upon the roof of the building. After the fire the engine was sent to the round-house and the spark arrester above the fire box of the engine was examined. The examination revealed that the screen of the spark arrester had a hole in it about two inches by six in dimension which would allow the escape of live cinders and sparks. The superintendent of the ice company had heard that this engine had previously caused other fires, and had detailed a man to follow the engine as it ran in and out of the premises, and to be on the lookout and extinguish any fire that might be set. The fact that the spark arrester was imperfect does not appear to have been known to anybody until after its examination subsequent to the fire. Three different engines were from time to time employed in operating the "swing train" upon the ice company's premises, but the engine which was upon the premises at the time of the fire was the one most frequently used.

Appellant's first contention is, that the evidence establishes that the ice company knew the danger to which its property stood liable from the use of the engine, and that with this knowledge, having invited the engine upon the premises, and voluntarily exposed its property to the risk, it is precluded from recovering for an injury which directly results from such exposure. That the principal of law here declared is sound there can be no question, but that the facts in this case were so well established in appellant's favor as to bring the ice company within the application of the principle is a very different matter. Appellant relies particularly upon the case of *Marquette etc. R. R. Co. v. Spear*, 44 Mich. 169; 38 Am. Rep. 242. The facts in that case were that plaintiffs owned a warehouse and a quantity of hay stored near it on premises of their own, and that upon these premises they had caused to be laid a track upon which railroad engines and cars had been running for their accommodation for a long time before fire. When plaintiffs had occasion for cars, they had an arrangement with the railroad company to draw them in and and take them out. A particular engine belonging to the railroad company was made use of for this purpose, and about the time of the fire it was going in and coming out several times a day. One of the plaintiffs testified that on the occasion of

the fire the engine went in and out, throwing sparks. He was sitting in his office watching them, and saw as she passed that a spark had communicated fire to the hay. The engine was noted for throwing sparks, and had two or three times before set loose hay on fire on the dock. "She had set fire, thrown fire around on the dock, and set loose hay on fire before in that season. She threw live cinders a quarter or a half an inch in diameter." The witness who so testified was one of the plaintiffs in the action. He had called the attention of the train dispatcher of the railroad to the dangerous condition of the engine, and the train dispatcher had said that he would see the engine fixed. Plaintiffs always had trouble with it, and were afraid of it because of its throwing sparks. The train dispatcher kept putting off the repairs. Nevertheless, plaintiffs continued to employ from day to day this dangerous implement until such a calamity as they feared actually occurred. These facts, Judge Cooley said, speaking for the court, instead of showing a cause of action, effectually disprove one. "It was a case of private employment whereby the proprietors of the engine were solicited to send it upon the private business of the employers into a place where the latter well knew, and had for a long time known and understood, it was likely to do mischief. . . There is just the same and more reason for plaintiffs to complain of it than there would have been had they hired the owner of a vicious animal, known by them to be such, to bring him for their purposes upon their premises, and then been injured by him as they should have anticipated they might be. That which one consents to and invites, he cannot complain of in the law as an injury." But in its facts the case at bar is broadly distinguishable from the one relied upon. The ice company did not invite this particular engine upon their premises. They requested the railroad company to send an engine, and it sent, from several which it was in the habit of using, this particular one. The ice company had not direct knowledge that the locomotive was dangerous. The extent of their information appears to be that they had heard it had set fires before; and finally they did, as apparently the plaintiffs in the Michigan case did not, take counter precautions against the risk of fire, by employing a man to watch and guard against this very danger.

Therefore, if it be admitted that the evidence established that the ice company invited upon its premises for its own private ends a locomotive engine of the defendant known to be dangerous (a proposition which we are far from conceding the evidence does establish), nevertheless it appears that the ice company took certain counter precautions against the danger, and whether those precautions were such as reasonable care would dictate was a question properly submitted to the jury. We say properly submitted, for it does not follow, as appellant contends, that because the facts as to the nature of the precautions employed by the ice company to guard against the danger were proved without conflict or dispute, and because the precautions did not prevent the fire, that for these reasons the question of contributory negligence upon the part of the ice company became one of law to be decided by the court, and not one of fact to be submitted to the jury. If it is even fairly debatable whether or not the ice company acted with ordinary prudence in the light of its knowledge, the question is one for the jury, and the fact that such precautions as it took did not avail to prevent a conflagration is in no way determinative of the question, for, if it may be said that it can be determined by the result whether or not the person in any given case has exercised the degree of care with which the law charges him, it must logically follow that in every case in which a plaintiff has sustained injury he has been guilty of contributory negligence. It is always easy after an accident to see how it could have been avoided, but a man's duty before the calamity is not measured by such *ex post facto* information. (*Burke v. Witherbee*, 98 N. Y. 562.) There are some acts which, if a plaintiff commits, and there are some omissions of which if he be guilty, that are of such nature as clearly to fix upon him culpability and contributory negligence, if injury to him thereby result. But there is a vastly larger number of cases which come, not within this category, but are of the class where the question whether or not the acts of the plaintiff come up to or fall short of the degree of care required of him by law, is one of fact to be determined by the jury. Clearly, this is such a case, and it seems necessary in support of the conclusion only

to refer to such cases as *Fernandes v. Sacramento etc. Ry. Co.*, 52 Cal. 45; *Carr v. Eel River R. R. Co.*, 8 Cal. 366; *Van Praag v. Gale*, 107 Cal. 438; *Redington v. Postal Tel. Co.*, 107 Cal. 317; 48 Am. St. Rep. 132; *McKune v. Santa Clara etc. Co.*, 110 Cal. 480.

Appellant complains of instruction 2 given by the court at the request of the respondent. The instruction is too long for quotation. In hypothetical form it groups certain facts, and tells the jury that, if they believe these facts to be established by the evidence, a *prima facie* case is made out which would warrant a finding that the engine of defendant caused the fire. It is said that the instruction violates the constitutional provision, and that the court trespassed upon the domain of the jury in advising them upon the facts, and that the whole instruction is argumentative and unfair. A careful reading of it satisfies us that the criticism is not well founded. The evidence as to the cause and origin of the fire was circumstantial. As a part of the instruction the court said: "If upon the whole evidence, and taking into consideration all the conditions and circumstances surrounding the fire, you find it to be more probable that the fire was caused by sparks escaping from the swing engine than from any other cause, your finding upon that point, to wit, the origin of the fire, should be accordingly." This portion of the instruction is especially criticised as a declaration to the jury that they might reach a determination upon an important fact from mere conjecture, guess, or supposition, without any evidence in support of it; that they were told that they could reach a verdict upon the doctrine of probabilities, and it is said that a case is not proven by a preponderance of evidence when a mere probability is established. We think, under the facts and circumstances of this case, that this criticism is also without merit. The question of the origin of the fire was one to be determined by circumstantial evidence. No one saw a spark from the engine alight upon and set fire to the roof of the icehouse. It was, then, under the peculiar circumstances of this case, a proposition for the plaintiff to establish that the probability was that the engine occasioned the fire. Nor does the use of the word "probability" in the instruction of the court cast the question into the domain of mere conjecture and surmise. In civil cases which are decided in

favor of the litigant upon a mere preponderance of evidence, the rule of decision is, after all, but a rule of probability, and this is well recognized. Says Greenleaf: "In civil cases . . . it is not necessary that the minds of the jurors be freed from all doubt; it is their duty to decide in favor of the party on whose side the weight of evidence preponderates, and according to the reasonable probability of truth." And again: "A presumption of fact is an inference which a reasonable man would draw from certain facts which have been proved to him. Its basis is in logic; its source is probability." "Circumstantial evidence is of two kinds, namely, certain . . . and uncertain, or that from which the conclusion does not necessarily follow, but is probable only, and is obtained by process of reasoning." (1 Greenleaf on Evidence, 15th ed. 23, 24, 72.) Says this court, in *Butcher v. Vaca Valley etc. Ry. Co.*, 67 Cal. 518: "Evidence that sparks and burning coals were frequently dropped by engines passing upon the same road upon previous occasions has been held to be relevant and competent to show negligence and to make it probable that the plaintiff's injury proceeded from the same quarter." And further reference may be had to *Sheldon v. Hudson River Ry. Co.*, 14 N. Y. 218; 67 Am. Dec. 155; *Kelsey v. Chicago etc. R. Co.*, 1 S. Dak. 80; *Yankton Fire Ins. Co. v. Fremont etc. R. Co.*, 7 S. Dak. 428; *Longabaugh v. Virginia City & T. R. Co.*, 9 Nev. 271.

It has already been said that the court did not err in submitting to the jury the question of the contributory negligence of the plaintiff in the matter of the use of the particular engine. It submitted to the jury the proposition as to whether or not the precautions made use of by the ice company to prevent a fire were, under all the circumstances, such precautions as would be employed by a prudent man in a like case. But appellant objects that the court instructed the jury that the ice company did employ counter precautions, and insists that the question whether or not it employed counter precautions was one of fact for the jury. We think this criticism captious. Whether or not the counter precautions were adequate to relieve the ice company from the charge of contributory negligence was properly for the jury, but it is not disputed that the ice company did something—took some measures against the danger to which its property was ex-

posed. It employed a man to follow and watch the engine. Over this there was no dispute. It could not have injured the defendant that the court designated these acts of the ice company "counter precautions," when it carefully left the determination of their reasonable sufficiency with the jury.

The proof of loss was properly admitted in evidence as establishing plaintiff's liability for the moneys which it had paid to the ice company, and as a declaration within the issues of the pleadings against the defendant ice company, Plaintiff's counsel stated upon its introduction that no claim was made that any statement contained in it was binding upon the appellant. It was admitted for a limited purpose. (*Smith v. Whittier*, 95 Cal. 279.) The stipulation by agreement of the parties expressed upon the face of the writing itself was made admissible in evidence, and the declaration contained in the stipulation that the appellant had offered to pay the ice company the sum of twelve thousand five hundred dollars in addition to the insurance money was not injurious to the appellant, as the court instructed the jury at the request of appellant that "said offer was of itself neither an admission that the defendant had been guilty of negligence, nor that it had caused said fire, nor that anything was due to said Sierra Lakes Ice Company, or the plaintiff herein, by reason of said fire."

The judgment and order appealed from are affirmed.

Temple, J., Harrison, J., and Van Dyke, J., concurred.

McFARLAND, J., dissenting.—I dissent for several reasons; but, waiving other points, it is sufficient to say here that in my opinion the court below in giving instruction No. 2, asked by respondent, committed a material and prejudicial error for which the judgment should be reversed. The instruction is very long, and is, I think, erroneous as a whole, because it deals mainly with questions of fact and is argumentative. The specific part of it which, in my opinion, is clearly erroneous is as follows: "Proof to the effect that immediately before the breaking out of the fire, an engine of the defendant, burning coal for the purpose of generating steam, was in operation immediately by, and in close proximity to, the place where the fire broke out, and that such engine had, on previous occasions, set fire by sparks escaping therefrom, and that said engine was so operated in relation

to said property that a spark or sparks escaping therefrom could have set the fire, and the condition of the property and the surrounding circumstances being such as to warrant a belief on your part that the fire was more likely brought about by a spark or sparks from said engine than from any other cause, would be such reasonable evidence, and would *prima facie* establish that the fire had been caused by said engine, and would warrant a finding upon your part to that effect in the absence of evidence that the fire arose from some other cause." This language does not include a single proposition of law. It simply tells the jury how they should weigh the evidence and how certain inferences of fact should be drawn from other facts, and is an unwarrantable interference with the province of the jury. Such an instruction has been repeatedly held by this court to be erroneous, and to be in contravention of section 18, article VI, of the constitution. The error of such an instruction is aptly illustrated by the case of *People v. Walden*, 51 Cal. 588. The defendant in that case was charged with having fraudulently changed certain ballots which had been voted at an election, after they had been deposited in the clerk's office; and it was shown on the trial that a key which would fit and open the lock of the door leading to the clerk's office had been found on the person of the defendant, and the court below, speaking of the key, told the jury: "If you believe it would open the clerk's office where the ballots were kept, then the possession by the defendant unexplained raises a reasonable presumption that he had it for the purpose of opening that door." The court in its opinion said: "In no view can this charge be sustained. If it be said that it was an attempt to charge in respect to a legal presumption, it was clearly error, since no such presumption would arise from the fact stated, as a matter of law. If it was an attempt on the part of the court to instruct the jury that the existence of one fact, in view of the ordinary experience of mankind, and connection of events, must be presumed from the existence of another, this was an interference with what, as we have shown, is the exclusive province of the jury. It was charging the jury 'with respect to matters of fact,' and was a contravention of section 18, article VI, of the constitution of the state." In *Estate of Carpenter*, 94 Cal. 406, the court—we quote from the syllabus, which

correctly states what was decided—said: “Instructions as to the weight and value of evidence, stating what the jury are at liberty to conclude from certain facts, if found, involving a conclusion, not of law, but of the judging mind from the evidence, are in violation of the constitutional inhibition as to instructions upon matters of fact. The court has no right to dictate or even suggest the process of reasoning by which the evidence shall be judged.” (See, also, *Stone v. Geyser etc. Co.*, 52 Cal. 315; *People v. Carrillo*, 54 Cal. 63.)

For these reasons, and in accordance with the principle declared in the above cited authorities, the judgment, in my opinion, should be reversed and a new trial granted.

Rehearing denied.

[L. A. No. 367. In Bank.—July 22, 1899.]

E. L. MAYBERRY; Appellant, v. ALHAMBRA ADDITION WATER COMPANY, Respondent.

WATER RIGHTS—DIVISION OF STREAM—FUTURE DEVELOPMENT OF WATER—AMBIGUOUS CONTRACT—PRACTICAL CONSTRUCTION.—Where the owner of land in which a stream arose contracted with an adjoining owner for a division of the stream so as to give to the latter, or his assigns, the right to the flow of the stream two days in each week through a certain ditch, or any other aqueduct conducted by the former, or his assigns, across the land of the latter, for which a right of way was given under the contract, to the former or his assigns, together with the right to the flow of the remainder of the stream, the possibility of the future development of additional water by the former, or his assigns, was a circumstance surrounding the parties, and the contract being ambiguous or doubtful in relation to water thus developed, the practical construction placed upon the contract by the parties in relation thereto must control.

ID.—USE OF DEVELOPED WATER UNDER TERMS OF CONTRACT—COMMINGLING—ESTOPPEL.—Where the owner of the land upon which the stream arose conducted the natural water and that artificially developed, commingled together, in an aqueduct constructed across the lands of the adjoining owner, thereby bringing the whole flow within the literal terms of the contract, he cannot claim that the flow of the developed water across such lands was without right and not under the contract.

ID.—ACQUIESCENCE OF PARTIES—RIGHT TO USE OF FLOW.—Both parties having acquiesced in the right to flow the developed water

across the adjoining lands under the contract, the adjoining owner or his grantee has the right to use it two days each week, as part of the flow of the stream, so long as it is so conducted, in so far as may be reasonably necessary for the irrigation of the original adjoining tract.

ID.—WANTON DIVERSION NOT ALLOWED.—The adjoining owner cannot make a wanton diversion of the water, to the injury of the other party, without benefit to himself.

ID.—RIGHT TO PERIODIC FLOW OF STREAM—MEASUREMENT.—Where a party has a contract right to the periodic flow of the water of a stream for two days in the week, he is entitled to the entire flow of the stream for the time specified, when necessary for the irrigation of his tract; and his rights in the stream cannot properly be measured by a fixed quantity thereof in inches. If he does not at present need or use all the flow of the stream, that fact does not authorize a restriction of his privileges under the contract.

ID.—ACQUIESCENCE IN MEASUREMENT.—The temporary acquiescence of such party in a measurement of his water right by inches by the other party to the contract, whatever effect it may have upon his claim for damages, cannot affect his rights under the contract, if not continued for a sufficient time to bar his rights by adverse user.

APPEAL—FINDINGS AND JUDGMENT TOO BROAD—REVERSAL.—Upon appeal, where the findings and judgment appear to be broader than the facts warrant, and they apparently cast a cloud on rights clearly belonging to the appellant, the judgment must be reversed.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order denying a new trial. Walter Van Dyke, Judge.

The facts are stated in the opinions in this case, and in the opinion of the court in the former case, reported in 88 Cal. 68.

Anderson & Anderson, Van R. Paterson, and Rodgers, Paterson & Slack, for Appellants.

A. M. Stephens, and Graves, O'Melveny & Shankland, for Respondent.

BEATTY, C. J.—A rehearing of this cause was ordered after decision in Department. We refer to the Department opinion for a statement of the facts to be considered, and we adopt its conclusions, except upon one point.

With respect to the rights of the parties to the use of the

water artificially developed by the defendant, we think the contract of 1860 (quoted in full in *Alhambra etc. Water Co. v. Mayberry*, 88 Cal. 68) requires a construction more favorable to the plaintiff than was placed upon it by the superior court and by the Department. When Kewen and Wilson entered into that contract, the possibility of developing in the future water in addition to that then flowing in the canada was one of the circumstances by which they were surrounded, and there is nothing in the terms of the contract to denote whether they did, or did not, take it into consideration. If, therefore, the defendant, by causing the water which it has developed to flow through the aqueduct which it maintains across the Kewen land, has brought such water within the literal terms of that clause of the contract which entitles the plaintiff to use on two days of the week "the water flowing in any water ditch, flume or aqueduct used, dug or erected by the parties of the first part," et cetera, we cannot see how the defendant can appeal to the circumstances surrounding the parties at the date of the contract to modify the natural construction of the language in which their intention is expressed.

But, aside from this, the least that can be said of this provision of the contract is that it is ambiguous and doubtful. Such being the case, the practical construction placed upon it by the parties must control.

It appears that the defendant, from the commencement of its development of water in 1887 down to the trial of this action, has been conducting all the water "flowing in the glen"—natural, and artificial mingled together—through its pipe across plaintiff's land. It does not lie in defendant's mouth to say that it has been doing this without right, and its only right is derived from the contract of 1860. It has thus put its construction upon that contract, and the plaintiff having acquiesced, it must be held that the parties have themselves determined that the defendant has the right under the contract to conduct the developed water across the plaintiff's land. If, so, it follows that the plaintiff has the right to use it on two days of the week, so long as it is so conducted. If one stipulation of the contract applies to the flow artificially created, so must the others. We do not decide that the defendant is obliged to continue to conduct the

developed water across the Kewen tract, but only that so long as it claims and exercises the right to do so the plaintiff can claim and exercise the reciprocal right to use the water as the contract provides. Nor are we to be understood as holding that the plaintiff is entitled to divert from defendant's pipes at any time more water than is reasonably necessary for the irrigation of that portion of the original Kewen tract of which he is the owner. He is not, in other words, to make a wanton diversion, to the injury of defendant without benefit to himself.

The judgment and order of the superior court are reversed, and the cause remanded for further proceedings in accordance with the opinion of the Department as herein modified.

Henshaw, J., Temple, J., and McFarland, J., concurred.

The following is the opinion rendered in Department Two, September 10, 1898, referred to in the foregoing opinion:

BRITT, C.—In the year 1860 one B. D. Wilson owned a considerable body of land, which included the source and upper portion of the channel of a stream of water flowing in a canyon or glen on said land and called the Mill stream. Adjacent on the south to Wilson's land, and traversed by the lower course of said stream, was a tract of public land, one hundred and fifty-four acres in extent, occupied by one E. J. C. Kewen, to which said Kewen afterward acquired title. For the purpose of apportioning the flow of said stream between themselves for irrigation and other uses, the said Wilson and Kewen entered into a written contract, of date May 7, 1860, whereby Wilson granted to Kewen the right to enter on his, Wilson's aforesaid land on the west side of said canyon and take the water flowing therein through a certain "upper water ditch" and use the same for irrigating the land of him, the said Kewen, during Friday and Saturday of each week; Kewen on his part granted to Wilson the right of way over his said tract of one hundred and fifty-four acres for the construction of ditches, flumes, and aqueducts, and to conduct water through the same to such outside points as Wilson might select, subject to the right of Kewen to use for irrigating his land, during two days in the week as aforesaid, the water flowing in said "upper ditch, or in any water ditch, flume or aqueduct used, dug, or erected" by Wilson on Kewen's

land. The contract in terms bound the assigns of the parties thereto. The Alhambra Addition Water Company, a corporation, defendant here, has succeeded by purchase to lands of Wilson, including the upper part of said canyon, and to all his rights under said contract; in like manner Mayberry, the plaintiff, has acquired the interest of Kewen in the contract and the title to said one hundred and fifty-four acre tract of land, together also with a certain parcel of fifty acres lying north of Kewen's original tract, and at the mouth of said canyon, which was conveyed by Wilson to Kewen by deed on November 29, 1871. This deed reserved to Wilson all water rights had by him in the fifty-acre parcel.

Said contract of 1860, and a statement of the circumstances inducing the same, appear at length in the opinion of the chief justice rendered in a former action between the parties here and reported in *Alhambra etc. Water Co. v. Mayberry*, 88 Cal. 68. That action was begun by the water company (defendant in the present case) on April 18, 1886, against Mayberry (the present plaintiff), and had for its principal object the determination of the rights of the parties in the water which was the subject of said contract. The judgment of the superior court therein was rendered on December 28, 1887, in favor of the water company, it contained the following provisions among others: That Mayberry is entitled to divert and use, on Friday and Saturday of each week, all or so much as may be necessary, of the waters of said canyon for the purpose of irrigating, on those days only, any or all of the tract of one hundred and fifty-four acres formerly owned by Kewen. "Also the right to divert and use on said days, and for said purpose of irrigating said lands, any water flowing in any ditch, flume, or aqueduct made, constructed, or used by said Wilson . . . or by the plaintiff . . . over or across the said one hundred and fifty-four acre tract of land." That the water company is entitled to the exclusive use of the waters of said canyon, subject to the expressly specified rights of Mayberry; and that it has, and he has not, the right to develop water on that portion of the fifty-acre tract lying in said canyon. On appeal taken by Mayberry, this court affirmed the judgment, except in the particular last stated, as to which it was determined that Mayberry has the right to develop water on the fifty-acre

tract by digging wells, running tunnels, and the like, not interfering with the flow of the stream. (*Alhambra etc. Water Co. v. Mayberry, supra.*)

Pending said former action, viz., in July, 1887, the water company began a series of explorations for water on its own land in the said canyon above the holdings of Mayberry, and continued the same during the period of some five years, and by means of wells, tunnels, et cetera, it tapped sources of subterranean supply and conducted the same into the channel of said stream, thereby adding to the volume of the same a quantity of water which would not naturally flow therein at all; speaking approximately, and not meaning to decide the fact, the flow of the stream was in this manner about doubled. All the water when used by the water company is conducted through a large pipe laid across the said one hundred and fifty-four acre tract—the head of the pipe being above the northerly line of that tract and on the said fifty-acre parcel.

1. The present action was instituted by Mayberry on July 17, 1894. The main question involved is, whether he may use the water added to the stream as aforesaid in the same manner that he uses the natural flow; he claims that right both under the contract of 1860 and the judgment in said former action. The chief privilege secured to Kewen by said contract was the right to enter on Wilson's land and take on Fridays and Saturdays "the water flowing in said glen"; these words reasonably denote the then existing natural flow of the stream, and do not reasonably denote water to be in the future artificially developed or imported by Wilson or his assigns and turned into the channel. The right to the artificial increment is quite distinct from the title to the natural flow, and the owner thereof may reclaim it from the channel. (*Butte Canal Co. v. Vaughn*, 11 Cal. 143; 70 Am. Dec. 769; *Paige v. Rocky etc. Canal Co.*, 83 Cal. 84.) It is true that after the description in the contract of the privileges accorded to Wilson of constructing conduits across the land of Kewen and leading water through them, there followed a clause reaffirming the right of Kewen to use for irrigation the water flowing in the upper ditch "or in any water ditch, flume, or aqueduct used, dug, or erected" on his land pursuant to the permission of the contract; but we understand this

provision to mean that Kewen might use the water whether flowing in the "upper ditch" (which then existed) or in some other aqueduct which Wilson or his successor might thereafter provide for its transmission to lower levels across Kewen's land, and had no reference to an extension of the right of Kewen to water other than that of the stream. Whether the water company has the right to convey the developed water in the pipe across plaintiff's land is a question which does not arise in this case; whether such use is rightful or not—a matter on which we intimate no opinion—the title to the water is not affected.

When said former action was begun the water now in controversy formed no part of the stream, but was as absolutely the property of the water company as were the solid strata through which it percolated or by which it was restrained from emerging in the channel (*Gould v. Eaton*, 111 Cal. 639, and cases cited); as we read the pleadings in that suit (which are brought up in the record here), they submitted for adjudication no issues concerning this water. There were some references in the complaint to the right to develop water, but, considered in their context, it is apparent that they were pointed to the acts of Mayberry on the fifty-acre tract—the water company claiming, in virtue of the reservation of water rights in the deed of November 29, 1871, that Mayberry had not the right to develop water on that tract, a contention which was overruled in this court. Understanding said judgment in the light of the pleadings on which it rested and the facts then existing, we think it plain that it does not operate to enlarge the meaning of the contract of 1860 in Mayberry's favor. (*Lillis v. Emigrant Ditch Co.*, 95 Cal. 553; *Caperton v. Schmidt*, 26 Cal. 479; 85 Am. Dec. 187.) We are fully mindful of the argument founded on what Mayberry appears to consider a cumulation of rights decreed to him in that judgment—it declaring that he is entitled to divert and use for two days of the week all the water of the canyon necessary to irrigate the described land, and "also the right to divert and use on said days and for said purpose . . . any water flowing in any ditch, flume, et cetera, made, constructed, or used by Wilson or his successors in interest . . . over or across" the land of plaintiff. This provision can apply only to rights which were sub judice in

that action; and, in our opinion, it has substantially the same effect as the corresponding clause of the contract of 1860—which, no doubt, it was the purpose of the judgment to confirm—viz., to establish the right of Mayberry, within the stated limits, to divert and use the natural water of the stream from whatever aqueduct may be used for conducting it across his land; but this includes no interest in the artificial flow.

2. Previous to November, 1892, plaintiff was accustomed to divert the water for irrigation on Fridays and Saturdays from the aqueducts of plaintiff into which it flowed from the stream. At that time defendant undertook to apportion to plaintiff the quantity of water which it assumed to be the natural flow, and thereafter measured the same by means of certain weirs into his diverting appliances, retaining in its own aqueducts the residue which was assumed to be the added or developed water. The amount of water which defendant thus undertook to measure to plaintiff was fifty inches under four-inch pressure, and the court found that the natural flow during the irrigating season does not exceed that amount. One of the objects of the action is to enjoin defendant from interfering with the use of the water to which plaintiff is entitled; the court found in effect that the said conduct of defendant respecting the measurement of the water constitutes no interference with plaintiff's rights, and that he will receive in that manner all the water he is entitled to.

These findings are not sustained by the evidence. There is nothing in the contract of 1860 which fixes the amount of water to be used by Kewen at any quantity less or greater than the whole natural flow on the two specified days when necessary for the irrigation of his tract. The fact, if such fact there is, that plaintiff does not at present use or need all the natural flow to irrigate the land as he now cultivates it, does not authorize a restriction of his privilege under the contract; his necessities for use of the water to irrigate his land may increase in the future. The flow doubtless varies with the annual rainfall and with the progress of the dry season; the evidence of defendant's own engineers of a measurement made with great care on June 24, 1887, just before defendant began the work of developing water, shows that fifty-five inches then flowed in the channel; we do not find that

the force of this evidence is avoided by anything else in the record; it seems probable that at times during the irrigating season the natural volume was yet greater, and no doubt it was at times less. The mistake of the water company lay in taking charge of the natural flow on Fridays and Saturdays and assuming to measure to plaintiff a fixed quantity thereof; it had the right to measure and retain for its own exclusive use the amount of added or developed water, but it was the right of plaintiff to take the residue, whether much or little, so far as was necessary to irrigate his land, without interference by defendant. (See *Butte Canal Co. v. Vaughn*, *supra*). Of course, if he should abuse that privilege, contrary to the contract and the former judgment, he might be restrained. Defendant dwells somewhat on the fact asserted that Mayberry acquiesced in its apportionment of the water to him from November, 1892, to the commencement of this action; we do not see how this was material unless as bearing on his claim for damages—which he does not urge on appeal; such acquiescence could not impair his interest under the contract unless continued for a time sufficient to bar his right by adverse user.

3. There were certain findings on which are founded a provision of the judgment that defendant is the owner (subject to qualifications not necessary to state) "of all the water rights in said Mill stream and of all the land through which the same flows, from its source to the point where it conducted into defendant's main pipes." As the fifty-acre tract of land conveyed by Wilson to Kewen in 1871 includes part of the channel, and as the flume through which the water is conducted to defendant's main pipes lies also on that tract, the findings and portion of the judgment just mentioned are broader than the facts warrant; they perhaps cast some cloud on the rights of plaintiff in said fifty-acre parcel, and should be modified.

Some other points are made by appellant, but considering the views above advanced it is believed that they become immaterial. While we are satisfied that upon the main subject of dispute—the use of water developed by defendant—the decision of the court below was right, yet because of the errors in minor particulars we have indicated, and to the end that the same may be corrected, the judgment and order denying a new trial should be reversed.

Chipman, C., and Belcher, C., Concurred.

For the reasons given in the foregoing opinion the judgment and order denying a new trial are reversed.

McFarland, J., Temple, J., Henshaw, J.

Rehearing denied.

[S. F. No. 1026. Department Two.—July 24, 1899.]

JAMES T. BOYD et al., Appellants, v. E. A. HERON et al.,
Respondents.

STREET RAILROAD CORPORATIONS—CREATION OF BONDED INDEBTEDNESS—
LIABILITY OF STOCKHOLDERS.—Bonds issued by a street railroad corporation in part payment for the construction of its railroad, are for the creation of a bonded indebtedness within the provision of section 359 of the Civil Code, requiring the creation of the bonded indebtedness of any corporation to be approved by the vote of two-thirds of the entire capital stock; and in default of such approval no liability is created upon such bonds against the stockholders.

ID.—CONSTRUCTION OF CODE.—Section 456 of the Civil Code permitting railroad corporations to issue bonds in payment of any debts or contracts for constructing or completing their road is to be construed in connection with the general provisions of section 359 of the same code, requiring all corporations to give the stockholders a voice in saying whether or not a bonded indebtedness shall be created or increased.

APPEAL from a judgment of the Superior Court of Alameda County. S. P. Hall, Judge.

The facts are stated in the opinion of the court.

Adair Welcker, and William H. Fifield, for Appellants.

Samuel Bell McKee, Chickering, Thomas & Gregory, C. H. Wilson, John Yule, and Fitzgerald & Abbott, for Respondents.

HENSHAW, J.—Plaintiffs brought this action against defendants as stockholders of the Consolidated Piedmont Cable Company, a street railroad corporation, for the purpose of enforcing their liability as stockholders for an indebted-

edness arising upon ten bonds for a thousand dollars each, issued in part payment for the construction of the company's road. Plaintiffs suffered nonsuit and from the judgment which followed they appeal.

The bonds were issued under authority of sections 456 and 457 of the Civil Code. These sections are under the subtitle of "Railroad Corporations," but by section 510 of the same code their provisions are applicable to street railway corporations.

It was urged with other grounds of nonsuit that no liability was cast upon the stockholders by the issuance of these bonds because the mode of their issuance was unauthorized by law. The contention of the appellants upon this point is that the bonds were duly issued in compliance with the provisions of sections 456 and 457, were issued for a purpose recognized by those sections, and that, though issued in payment of the work of construction, by their issuance a new and original liability was created against the corporation and against those who were stockholders at that time. By respondents it is insisted that the bonds could only be legally issued after compliance with the provisions of section 359 of the Civil Code, that these bonds were not so issued, that the stockholders never assented to the issuance, and that therefore the bonds are void, or that, at least, no liability against the stockholders on account of the bonds has been created.

This position of respondents we think is sound. The issuance of these bonds was not an increase, but the creation of a bonded indebtedness. Under the provisions of section 359 of the Civil Code the bonded indebtedness of a corporation may be created or increased by a vote of the stockholders representing at least two-thirds of the entire capital stock, at a meeting called by the directors, et cetera. Section 456 of the Civil Code declares that railroad corporations may issue bonds in payment of any debts or contracts for constructing and completing their road, and further authorizes the directors to impose regulations and restrictions upon the issuance. Section 359 is a general section applicable to all corporations, one of the most important provisions of which is to give the stockholders a voice in saying whether or not a bonded indebtedness shall be created or increased. No

reason is perceived why railroad corporations should be relieved from the operation of this salutary provision. It does not thereby follow that section 456 is void, but that it is to be construed with section 359, as was done in the case of *Market Street Ry. Co. v. Hellman*, 109 Cal. 571-94. Therein it is said that section 359 "provides the method by which the bonded indebtedness of all corporations is to be created or increased," while section 456 confers upon railroad corporations the power to create such an indebtedness. Construing these sections together, then, under section 456, the directors may prescribe reasonable regulations which shall govern the proposed bond issue, but before the issue can be legally made, the assent of the required number of stockholders thereto must be had in compliance with the mode laid down in section 359.

In *McLane v. Placerville etc. R. R. Co.*, 66 Cal. 606, the provisions of the statute under which those railroad bonds were issued were substantially identical with the terms of section 456 of the Civil Code. The legality of the bond issue in that case was upheld, but at that time there was not upon our books any such statutory provision as is found in section 359 of the Civil Code.

Whether or not the bonds are void, so as to cast no liability upon the corporation, we are not here called upon to consider; but we think it quite plain that those who were stockholders at the time of the bond issue may be heard to say that because of the irregularity of the issue, and of their deprivation of an important right to vote upon the bond issue, no liability against them has been created.

The judgment appealed from is therefore affirmed.

Temple, J., and McFarland, J., concurred.

Hearing in Bank denied.

[S. F. No. 1077. Department One.—July 24, 1899.]

HENRY LANZ, Respondent, v. FRESNO LOAN and SAVINGS BANK, Appellant.

BANK—LIQUIDATION UNDER ADVICE OF BANK COMMISSIONERS—CONTROL OF OFFICERS—ACTION BY DEPOSITOR.—The closing of the doors of a bank, and the liquidation of its affairs under the control of its officers by the advice of the bank commissioners, in the absence of any proceedings taken under the banking act, is no defense to an action by a depositor, who has been wholly neglected in the distribution of its assets, to recover the amount of his deposit.

ID.—STOPPAGE OF PAYMENT—RIGHT OF ACTION—BY-LAW AS TO NOTICE—CASE FOLLOWED.—The stoppage of payment by the bank gave a right of action to the plaintiff for the recovery of his deposit, without regard to compliance on his part with a by-law requiring notice to be given to the bank of the intended withdrawal of moneys deposited. *Mitchell v. Beckman*, 64 Cal. 117, approved and followed.

APPEAL from a judgment of the Superior Court of Fresno County. J. R. Webb, Judge.

The facts are stated in the opinion of the court.

Horace Hawes, for Appellant.

L. L. Cory, for Respondent.

GAROUTTE, J.—Plaintiff brought this action to recover from the defendant certain sums of money deposited with it. The answer alleged that the deposits were made under and in accordance with a by-law of the defendant which required notice to the bank of any intended withdrawal of moneys deposited. It was further alleged that the defendant was visited by the bank commissioners, who required the defendant to levy an assessment upon its capital stock of ten dollars per share, and use the funds thus raised in the conduct of its business; that defendant refused to comply with this direction, and the bank commissioners “advised and directed defendant to liquidate and wind up its affairs”; that defendant closed its doors to all new business and proceeded to wind up its affairs, and is still doing so under the direction of said bank commissioners.

The court, after finding in substance the foregoing facts, further found: "That at all times since the defendant closed its doors the officers of the bank have had entire charge and control of the collection of all debts, securities, and assets, and the disbursement of the same, and a large amount of money has been since said time collected by the officers of said bank and disbursed to various depositors; and securities have, from time to time, been turned over to creditors of the bank in payment of their claims; that no payment has been made to plaintiff, but that defendant has, however, from time to time, received advices and instructions from the bank commissioners." From the foregoing facts the court declared, as a conclusion of law, that plaintiff was entitled to judgment, which was accordingly entered, and this appeal is taken therefrom.

There is no question raised as to the validity of the indebtedness of the bank to plaintiff, but it is insisted upon the part of the bank that it is in process of liquidation, and therefore cannot be sued by a depositor. In view of the findings of fact made by the trial court to the effect that the bank had collected and disbursed to various depositors large sums of money, and that securities have been, from time to time, turned over to various creditors of the bank in payment of their claims, and that plaintiff has been entirely overlooked in the making of these disbursements, it would seem that there should be some legal remedy which he might invoke to secure his rights. We see no importance to be attached to the demand of the bank commissioners that the bank levy an assessment of ten dollars per share upon its stock, and a refusal upon its part to comply with the demand. That matter appears to be wholly immaterial here. Neither do we attach any importance to the mere advice or direction of the bank commissioners given to the bank to wind up its affairs. We do not see that the bank stands in a different position as to the law when it proceeds to liquidate upon the advice and direction of the commissioners to that end, from that which it occupies, when, realizing its unfortunate condition, it proceeds to liquidate without advice or direction.

The banking act (Stats. 1887, sec. 11) provides that whenever a bank refuses to comply with orders given by the commissioners, directing the manner and conduct of its business

to be changed so as to comply with the requirements of its charter and the banking act, "or whenever it shall appear to said commissioners that it is unsafe for any such corporation as in this act mentioned to continue to transact business, they shall notify the attorney general of such fact, who after examination, in his discretion, may commence suit in the proper court against such corporation, to enjoin and prohibit the transaction of any further business by such corporation; and upon the hearing of the case, if the judge of the court where the case is tried shall be of the opinion that it is unsafe for the parties interested or for such corporation to continue to transact business, and that such corporation or institution is insolvent, shall issue the injunction applied for by said commissioners and attorney general, who shall cause said injunction to be served according to law." This injunction of the trial court is, in effect, an order throwing the bank into liquidation, and until the bank goes into liquidation under such order it is not protected from the suits of creditors. Until such time it is acting entirely independently of courts, and largely independent of bank commissioners.

In this case it nowhere appears that any proceedings have ever been taken by the bank commissioners and the attorney general resulting in the judicial declaration contemplated by the banking act; and until such action is taken the bank's legal status as to its creditors is not changed. From the standpoint of the law, in the absence of an express provision to that effect, it is incredible to believe that a bank, of its own motion, may close its doors and proceed to a liquidation which prevents its creditors from seeking the aid of courts to enforce their rights. However tightly the doors of the bank may be closed to the creditors by the directors, those directors cannot close the doors of the courts to its creditors; and the doors of the bank can never be closed so tightly at the mere whim or option of the directors or stockholders but that a court will open them at the request of the creditors. We conclude that, in the absence of the judicial declaration contemplated by the banking act, the right of action against the bank by creditors stands exactly as though its doors had never been closed and its business was progressing in the usual and ordinary channels.

There is no authority in this state opposed to the con-

clusion we have declared. In *Crane v. Pacific Bank*, 106 Cal. 64, there was a judicial decree against the bank as provided in the banking act, and in the other recent cases decided by this court bearing upon the construction of the banking act here involved nothing is decided contrary to the views now expressed.

Under the authority of *Mitchell v. Beckman*, 64 Cal. 117, there is no merit in the claim raised by appellant as to the noncompliance upon the part of plaintiff with the by-laws of the corporation defendant.

For the foregoing reasons the judgment is affirmed.

Harrison, J., and Van Dyke, J., concurred.

[S. F. No. 1607. Department Two.—July 25, 1899.]

Matter of the Estate of SUSAN CROOKS, Deceased.

ESTATES OF DECEASED PERSONS—DISTRIBUTION—MORTGAGEE OF DEVISEE.

—The distribution of the estate of a deceased person cannot be made to the mortgagee of an heir or devisee, or to an assignee as security, who is not a grantee of the heir or devisee. The decree must name the persons entitled under the will, or by succession; or their grantees.

ID.—RIGHT OF MORTGAGEE TO BE HEARD—INTERVENTION—PLEADING.—

The mortgagee has a right to be heard where his interests are affected by the decree of distribution; but no intervention should be allowed on his part, unless sustained by some pleading or statement as to the grounds on which he claims the right to be heard.

ID.—APPEAL BY MORTGAGEE—AGGRIEVED PARTY—INSUFFICIENT RECORD

—**DISMISSAL.**—An appeal by the mortgagee from the decree of distribution, the record upon which merely shows an offer of the mortgage in evidence, unaccompanied by a pleading or statement of facts, or by any showing that the mortgage debt was not paid, and does not show that the mortgagee is an aggrieved party, must be dismissed.

MOTION in the Supreme Court to dismiss an appeal from a decree of the Superior Court of the City and County of San Francisco distributing the estate of a deceased person. J. V. Coffey, Judge.

The facts are stated in the opinion of the court.

H. A. Powell, for Appellant.

Reddy, Campbell & Metson, and Ira D. Orton, for Respondent.

TEMPLE, J.—Susan Crooks died a resident of San Francisco, April 28, 1894, testate, and leaving a large estate. The will was probated, the executors qualified, and administration proceeded until the twenty-eighth day of November, 1897, when a petition was filed showing that the estate was ready for distribution. Notice was given, and April 1, 1898, the matter came on for hearing.

At the hearing the appellants, Wemple and Arnold, appeared and offered in evidence a document which purported to be a mortgage executed by Robert Lee Crooks, one of the devisees mentioned in the will of the testator, and also one of the heirs-at-law, upon all the right, title, and interest of the mortgagor of, in, and to all real estate in the two inventories in the estate of Matthew Crooks, and all the real estate in the inventory in the estate of Susan Crooks, and all the other real estate in which Robert Lee Crooks may have any interest as heir at law of Matthew Crooks or Susan Crooks, to secure the payment of a certain promissory note for the sum of six thousand dollars and interest. The note was then past due. Wemple and Arnold filed no pleading or other appearance in writing. The attorney simply appeared in the courtroom, offered the mortgage in evidence, and proposed to ask that the share of Robert Lee be distributed to them. In the mortgage it was stated that "the party of the first part authorizes and directs the probate court to distribute, set over, transfer, and deliver to the party of the second part all his right, title, and interest in and to said estate as security for the payment of said promissory note."

To this offer Robert Lee Crooks objected, on the ground that the law does not warrant the distribution of an estate to an assignee as security, but only to heirs, devisees, and their grantees. The objection was sustained, the appellants excepting, and the distribution was made regardless of the claim of appellants.

The offer of the mortgage in evidence was not accompanied by a statement as to other facts which the appellants undertook to prove, and, as no appearance was made in writing, it does not appear that the debt has not been paid. Motion is

now made to dismiss the appeal because it is not made to appear from the record that appellants are aggrieved parties.

The only section of the code authorizing distribution to the grantees of an heir, or a devisee, is section 1678 of the Code of Civil Procedure.

The court correctly held that this section would not warrant the court in distributing the property to appellants. They are not the persons entitled under the will, nor by succession, nor are they grantees to whom distribution could be made. The decree must name the persons entitled under the will or by succession, or their grantees. A mortgage is not a conveyance, but only a contract by which property is hypothecated for the performance of an act. (Civ. Code, sec. 2920.)

At the most, the court could only distribute the property to Crooks, subject to the mortgage. There is no law or practice which requires the courts, in making distribution of an estate, to determine by its decree whether an alleged mortgage upon the interest of an heir is valid, or the debt has not been paid, or whether there is not some defense to it. None of the questions are germane to the subject, nor is their consideration authorized by the statute, or at all. As determined in *Chever v. Ching Hong Poy*, 82 Cal. 68, the decree of distribution is only conclusive upon the matter of succession, or as to rights under will—at least, where the estate is distributed without an actual contest to the heirs, devisees, and legatees. Their title dates back to the death of the testator, or of their ancestor, and a distribution directly to them does not effect rights acquired from them since it accrued.

In fact, it seems to me so obvious that an estate should not be distributed to a mortgagee that the question hardly merits discussion. It does not follow, however, that appellants had not a right to be heard in the matter of the distribution. They have interests which may have been affected by the decree. To make the matter obvious let us suppose that they had a mortgage upon the interest of Robert Lee Crooks in his mother's estate, as an heir-at-law, as they did. Let us suppose that the entire estate was by the will given to others. It is in fact contended that it was so given, except a portion in trust for Robert Lee Crooks, so conditioned that it cannot be reached

by his creditors. Now, if the mortgagees thought the disposition made by the will was void, and the value of their security depended upon having the court so rule, they ought to be heard, and probably might intervene in some mode which would give them a hearing. The mortgagor might be quite satisfied with a decree which would render the security valueless.

But no such intervention should be tolerated, unless sustained by some pleading or statement as to the grounds upon which the intervenor claims the right to be heard in a proceeding to which he is not a party. His case does not come under sections 1678 of the Code of Civil Procedure, but under the general proposition that one whose rights are being adjudicated upon ought to be heard. Even under the statute I think if there is a controversy over the matter the issues should be made in writing. Appellants say they were prevented from proving their debt was not paid by the objection, which assumed a subsisting mortgage, but that, having such mortgage, they still had no rights. But it is quite plain that they had no rights as distributees, and such being the case it was most important that it should appear that they had some interest in the proceeding. This particular claim, that they had a right to be heard because their interests were involved, they did not make.

As a rule one who is not a party to the record cannot appeal in his own name. One not a party to an action or a proceeding may sometimes appeal, but in some way his interest must be made to appear in the record, and he may be a party to the ruling appealed from. According to the terms of the note contained in the mortgage offered, the money was past due, and nowhere in the record does it appear either by allegation or proof that it has not been paid, or that appellants had any debt or obligation secured by mortgage.

They were not shown to be parties aggrieved or parties at all to the proceeding.

The motion to dismiss the appeal is granted.

Garoutte, J., and McFarland, J., concurred.

Hearing in Bank denied.

[L. A. No. 512. Department One.—July 26, 1899.]

CITY OF LOS ANGELES, Appellant, v. E. F. KYSOR, Respondent.

PUBLIC PARK—DEDICATION—INTENTION—QUESTION OF FACT—CONFLICTING EVIDENCE.—The dedication *in pais* of a public park, or of land to any public use, can never be a matter of law. The owner's intention is the all important element in creating a dedication, and is a question of fact; and a finding of "no dedication" cannot be disturbed where the evidence is conflicting, though the preponderance of the evidence may be in favor of the dedication.

ID.—RECORDED MAP SHOWING PARK—SALES OF LOTS—OFFER OF DEDICATION—PUBLIC ACCEPTANCE—REVOCATION.—The record of a map, with the designation of streets and parks thereon, and the sale of lots by such map, whatever effect it may have upon the individual rights of the lot-owners, cannot conclusively establish the dedication of a park designated thereon to public use; but, treating it as an offer of dedication thereof, a finding of "no dedication" will be sustained, where no public acceptance of the offer is established, and the evidence tends to show a revocation of the offer.

ID.—EVIDENCE OF REVOCATION—CONTRACT OF SALE.—A contract for the sale of a park tract designated as such upon the recorded map is evidence tending to show a revocation of the offer to dedicate the park to public use.

ID.—ACCEPTANCE BY PUBLIC—PARTIAL USE FOR PLEASURE PURPOSES—PRIVATE OWNERSHIP.—Where there was no evidence of any act of acceptance of the park by the city, the mere occasional use of a portion of the grounds for picnics and other pleasure purposes, being consistent with private ownership, which was in fact exercised over the tract, cannot establish an acceptance of the park as such by the public, against a finding of "no dedication."

ID.—IMPLIED ACCEPTANCE—FINDING AGAINST ACCEPTANCE.—An acceptance of an offer to dedicate may be presumed or implied in many cases; yet a finding of fact that there never was an acceptance will rarely be set aside by an appellate court, where the claim of acceptance is based upon presumption or implication alone.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order denying a new trial. Walter Van Dyke, Judge.

The facts are stated in the opinion of the court.

W. E. Dunn and F. J. Thomas, for Appellant.

The recorded map and the sale of lots thereby constituted an offer to dedicate the parks and streets designated thereon to public use. (*Logan v. Rose*, 88 Cal. 263; *San Leandro v. Le Breton*, 72 Cal. 174; *Harding v. Jasper*, 14 Cal. 648.) There was an implied acceptance and a dedication of the park to the use of the public, which was irrevocable. (Elliott on Roads and Streets, 91, 97, 111; 17 Am. & Eng. Ency. of Law 400, 411; *San Leandro v. Le Breton*, *supra*; *Archer v. Salinas City*, 93 Cal. 43; *Stone v. Brooks*, 35 Cal. 497; *Smith v. Heath*, 102 Ill. 130; *Carter v. Portland*, 4 Or. 340; *Huber v. Gazley*, 18 Ohio, 18; *Abbott v. Mills*, 3 Vt. 521; 23 Am. Dec. 222; *Methodist etc. Church v. Hoboken*, 33 N. J. L. 13; 97 Am. Dec. 696.) The intention of the owner is to be ascertained and judged by his acts. (Elliott on Roads and Streets, 92; *Indianapolis v. Kingsbury*, 101 Ind. 200-13; 51 Am. Dec. 749.) The length of user by the public is immaterial. (*Rees v. Chicago*, 38 Ill. 322.)

Bicknell, Gibson & Trask, for Respondent.

No presumption of acceptance arises in this state from a mere offer to dedicate. (*Archer v. Salinas City*, 93 Cal. 52, 53; *Koshland v. Spring*, 116 Cal. 690, 698.) There is no such thing as a dedication between the owner and individual purchasers. (*Prescott v. Edwards*, 117 Cal. 298; 59 Am. St. Rep. 186; *Sacramento v. Clunie*, 120 Cal. 29.) The user of the so-called park was wholly consistent with private ownership of the ground. (Elliott on Roads and Streets, 131.)

GAROUTTE, J.—This action is brought to quiet title, and the city appeals. It is claimed that the tract of land involved is a public park and made so by dedication. The trial court, after hearing the evidence, made a finding of fact to the effect that there had never been a dedication of the land to public use and this appeal is mainly directed to an attack upon that finding. The salient facts are briefly these:

The defendant was the owner of a large tract of land adjoining the city of Los Angeles. He entered into a contract to sell this land to the Vernon Street Railway Company. Under this contract the railway company took a joint possession of the property. This land was to be immediately sub-

divided into lots and blocks and placed upon the market for sale. Thereafter, the parties filed a map of the tract in the recorder's office, showing a subdivision thereof into blocks and lots and streets. The tract involved in this litigation was marked upon the map as "Central Park." Thereafter the defendant and the railway company entered into a contract with Gillis and others, whereby they agreed to sell to Gillis et al. the tract marked "Central Park," in consideration that said Gillis et al. should keep "said premises as a public park for a period of not less than twenty-five years." Shortly thereafter this agreement was canceled. Subsequently the railway company quitclaimed to defendant all its interest in and to the tract. Both prior to this deed and subsequent thereto defendant conveyed many lots in said tract to purchasers by reference to the aforesaid map. This tract was located upon the line of the road of the railway company, and during all these times was open to the public. There are various small matters of evidence bearing upon the question of dedication, which we pass by without detailed mention.

It is said in *San Francisco v. Grote*, 120 Cal. 62; 65 Am. St. Rep. 155: "It is not a trivial thing to take another's land, and for this reason the courts will not lightly declare a dedication to public use. It is elementary law that an intention to dedicate upon the part of the owner must be plainly manifest." In the face of the rule here declared, we are asked to reverse a finding of fact to the effect that no dedication took place, upon the ground that there is no material evidence to support it. We cannot reverse this finding of "no dedication," if there is a substantial conflict in the evidence. We cannot set aside the finding even though the evidence should be found to largely preponderate against it. As said in *Sacramento v. Clunie*, 120 Cal. 32: "Even conceding this evidence sufficient to support a finding of dedication, still it is not sufficient to reverse a finding of 'no dedication.'" In all those cases where it is claimed that a dedication is created *in pais* it may be said that there is no amount of evidence which will justify a court in instructing a jury that dedication is conclusively shown. The owner's intention is the all-important element in creating a dedication, and that intention is a question of fact. It never can be a matter of law. Hence, when the person's intention in doing

an act is the all-important element involved in the trial of a question of fact, it is peculiarly the province of the jury, or the trial court, to say what that intention is; and here this court, in view of the test which must be applied, cannot say that the solution made of this question of fact by the trial court was wrong.

Dedication is the joint effect of an offer by the owner to dedicate land, and an acceptance of such offer by the public. Only two parties are necessary to a dedication, the owner upon the one side and the public upon the other. There can be no dedication without the participation of both; and no dedication can be stronger or more binding by the participation or intervention of others. The offer of the owner to dedicate may be manifested in a hundred different ways; and the acceptance of the offer by the public may be manifested in a like number of ways. Again, the fact that the owner sells lots by reference to a map of the tract, duly recorded, is not at all conclusive evidence of a dedication to the public of the streets and parks platted upon the map. It is but some evidence of dedication—evidence weak or strong according to the circumstances of each particular case. It is said in *Prescott v. Edwards*, 117 Cal. 301; 59 Am. St. Rep. 186: "There is no such thing as a dedication between the owner and individuals. The public must be a party to every dedication. Some of the cases say that platting a tract of land, recording the plat, and selling lots by reference to such plat, constitute a dedication of the streets in favor of the purchasers of these lots, even though the dedication to the public is not perfected and completed. The statement is not correct as a legal principle, as may be seen from what has already been said."

Whatever may be the legal rights of the purchasers from defendant of the lots marked upon the recorded plat, by reference to the plat, is a matter not before us. It is said in *Sacramento v. Clunie*, *supra*. "In the consideration of the question here presented it must be borne in mind that the litigation is alone between the owner and the city. The question is purely one of dedication. The rights of the owners of the blocks who may have purchased from the parties filing the map are not involved. Such sales may be some evidence of intention to dedicate, but nothing more. The

respective rights of owners rest upon other and different principles of law." As conclusively demonstrating that the filing of a plat in the recorder's office, exhibiting upon its face blocks, lots, and streets, followed by sales of lots according to the plat, does not necessarily dedicate the street marked upon the plat to public use, we have but to cite cases like *Schmitt v. San Francisco*, 100 Cal. 307, where *Archer v. Salinas City*, 93 Cal. 53, is quoted with approval to the following effect: "The owner, after selling some of the lots according to such map, might either with the consent of the purchasers, or if he should himself repurchase all of the lots so sold, withdraw such offer at any time before the public had acquired any interest in the streets, either from formal acceptance or by actual user." Of course, if the afore-mentioned acts had constituted a dedication of the streets to public use, there could be no such thing as a revocation of that dedication by the owner.

Conceding that the acts done by the defendant and the railway company in making and recording the plat constitute an offer of dedication, still there is evidence of revocation of that offer, and also but slight evidence of the acceptance of the offer. As we have heretofore shown, an intention to dedicate must be plainly manifest or there is no offer. In this case, the particular tract of land in dispute is designated upon the plat as "Central Park." If it had been designated thereon as "Private Park" it could not be claimed for a moment that an intention to dedicate it to the public was plainly manifest by the filing of the plat. Again, if it had been designated upon the plat as "Public Park," the intention to dedicate would be quite apparent. Now in the present case it is designated as "Central Park." Certainly, under such designation, the intention of the owner is not as plainly manifest as in either of the illustrations we have cited. Yet, assumming an offer to dedicate this tract as a public park was made by the owner, still the finding of "no dedication" should be sustained. The act of defendant and the railway company in contracting a sale of this park tract to Gillis and others was evidence strongly tending to show a revocation of the offer to dedicate. No evidence of any act of acceptance by the city of the offer to dedicate can be found in the record anywhere, either prior or subsequent to this contract of sale. A portion of the grounds was used by the public for picnics and other pleasure purposes, and this was all.

The city bases an acceptance of the offer largely upon this ground; but such use was entirely consistent with the ownership by the defendant and the railway company. Indeed, all and every kind of ownership was exercised over this tract by defendant, the railway company, and Gillis and others, during all these years; and nothing was ever done by the city to indicate a claim of interest upon its part. While an acceptance of an offer to dedicate may be presumed or implied in many cases, yet a finding of fact that there never was an acceptance will rarely be set aside by an appellate court where such claim of acceptance is based upon presumption or implication alone. There are a few other matters of evidence which we have not stated in detail, some looking favorably to a dedication, and others looking the other way. They do not change the result, and the finding of no dedication to public use by the owner of the tract marked "Central Park" will not be set aside. The evidence is ample to sustain that finding.

We have carefully examined the errors of law relied upon by appellant, but find nothing suggested therein demanding a new trial of the cause.

For the foregoing reasons the judgment and order are affirmed.

Harrison, J., and McFarland, J., concurred.

[Sac. No. 497. Department One.—July 27, 1899.]

F. M. POWELL, Appellant, v. BANK OF LEMOORE et al.,
Respondents.

DEED OF TRUST—SALE—INJUNCTION IMPROPERLY ALLOWED—UNTRUTHFUL ALLEGATIONS—ACTION TO REDEEM.—A sale under a deed of trust, even if in technical violation of an injunction, will not be disturbed in equity, where it appears that the debtor improperly obtained the injunction by untruthful allegations of fact; and in such case, he cannot maintain an action to redeem the property sold.

LP.—MAXIMS—RELIEF FORBIDDEN TO VIOLATOR OF EQUITY.—Under the application of the maxims, that "no man can take advantage of his own wrong," and that "he who comes into a court of equity

must come with clean hands," one who has been guilty of conduct in violation of these fundamental principles of equity jurisprudence can have no relief in equity.

ID.—SALE IN VIOLATION OF INJUNCTION NOT VOID.—A sale under a deed of trust, in full violation of an injunction, is not void, but merely voidable, and will only be relieved against upon a proper showing by a party entitled to the consideration of a court of equity.

ID.—FINDINGS IN ACTION TO REDEEM—IMMATERIAL OMISSIONS—ADMISSION OF PLEADINGS—OFFER TO REDEEM AFTER TITLE PASSED.—The failure to find, in the action to redeem the property sold, that the injunction was issued, is immaterial where that fact was admitted by the pleadings; and the failure to find upon an alleged offer to redeem the property by paying the full amount is immaterial where the complaint shows that such offer was made after the sale and deed of the property, and the court found the ultimate and controlling fact that the title to the land passed by the sale and deed.

APPEAL from a judgment of the Superior Court of Kings County. Justin Jacobs, Judge.

The facts are stated in the opinion of the court.

Rowen Irwin, and Charles G. Lamberson, for Appellant.

The judgment should be reversed for failure to find upon material issues. (*Baggs v. Smith*, 53 Cal. 88; *Smith v. Mohn*, 87 Cal. 497.) The sale, being in violation of the injunction, if not absolutely void, is voidable upon a direct attack, such as the present. (2 High on Injunctions, sec. 1461; *Bagley v. Ward*, 37 Cal. 121, 139; 99 Am. Dec. 256; *Winn v. Albert*, 2 Md. Ch. 42; *Union Trust Co. v. Southern etc. Co.*, 130 U. S. 565; *Ward v. Billups*, 76 Tex. 466; *Bissell v. Besson*, 47 N. J. Eq. 580.)

M. L. Short, and Horace L. Smith, for Respondents.

There was no necessity to find a fact admitted by the pleadings. (*Gruhn v. Stanley*, 92 Cal. 86.) The ultimate fact of title being found, which supports the judgment, the failure to find upon the subsequent offer to redeem is immaterial. (*Southern Pac. R. R. Co. v. Dufour*, 95 Cal. 619; *Merrill v. Merrill*, 102 Cal. 317.) The plaintiff is not entitled to relief, not having clean hands, and not being entitled to take advantage of his own wrong. (Civ. Code, sec. 3517; 1 Pomeroy's Equity Jurisprudence, sec. 397.) The sale was not void, and passed title. (*Bagley v. Ward*, 37 Cal. 121; 99 Am. Dec. 256.)

VAN DYKE, J.—The action is one to redeem certain real estate situated in Kings county, sold to the defendant bank under a deed of trust. Judgment went for the defendant bank, and the appeal is from the judgment without a bill of exceptions.

The court below found that plaintiff, on January 12, 1897, commenced an action in the superior court of Kings county against the Bank of Lemoore, Henry C. Campbell, Thaddeus B. Kent, and the San Francisco Savings Union, and procured an order from the judge of the superior court directing an injunction to issue to the defendants therein named, enjoining them from selling the land mentioned in the complaint herein; that said injunction was served on the Bank of Lemoore at 11 o'clock A. M., of said twelfth day of January, 1897, but was never served on Henry C. Campbell and Thaddeus B. Kent, the trustees who had advertised the land for sale in San Francisco; and that they had no notice or knowledge of the said injunction prior to the sale of said land by them; that said trustees sold said land at the appointed time and place, and the same was purchased by the Bank of Lemoore, through its agent, R. E. McKenna, and that upon the same day the said trustees made and delivered to the Bank of Lemoore a deed conveying said land, and that at the time they made and delivered said deed they had no knowledge or notice of the issuance of the injunction; and that said McKenna, as agent of said bank, had no knowledge or notice that a writ of injunction had been issued to prohibit the sale. The court further found that the allegation in the complaint, upon which the injunction was issued, to wit, that on or about the twenty-fifth day of October, 1896, the San Francisco Savings Union, while it was the owner and legal holder of said note, for valuable consideration, to wit, the payment of one year's interest thereon in advance, made and entered into a contract with plaintiff wherein and by the terms of which the time of payment of the principal of said promissory note was extended for the period of one year therefrom, was untrue and not founded in fact. And that the further allegation in the said complaint that no part of the principal of said promissory note, or the interest thereon, is now due, was also untrue and not founded in fact. And because of

these untruthful allegations appearing in said complaint, the court directed the said writ of injunction to issue in said action above mentioned, and the court now finds that said writ of injunction was improperly obtained by the plaintiff, F. M. Powell, and but for said untruthful allegations would not have issued. As a conclusion of law, deduced from its findings of fact, the court finds that the Bank of Lemoore is the owner of the land, that the plaintiff has no title or interest therein, and that the plaintiff take nothing by his action.

The appellant contends that the judgment should be reversed because the court failed to find upon material issues made by the pleadings. One of these is that the court failed to find that the injunction was issued. This fact was alleged in the complaint, and not denied in the answer, and, therefore, there was no issue upon that point rendering the finding necessary. It is claimed, also, that the court failed to find on the question of the offer to redeem the property by paying the full amount. The allegation of the complaint in this respect is not specific as to the time when such offer was made, but a reading of the whole shows that the offer was made, if at all, after the sale of the land to the bank and the execution of the deed thereon. It is alleged in the complaint that the offer was refused by the bank, because, as it claims, it acquired a valid title to the land through the sale, and was the owner of the property. The finding of the court, however, that the title to the land passed to the defendant bank by the sale on January 12, 1897, by the trustees, was the ultimate and controlling fact in the case and sufficient to support the judgment.

Even if the injunction had been technically violated by the sale, the plaintiff is not in a position to complain. The court finds that because of the untruthful allegations made by plaintiff, contained in his complaint, the writ was issued. "No one can take advantage of his own wrong" (Civ. Code, sec. 3517); and "he who comes into a court of equity must come with clean hands," is an old and familiar rule. Mr. Pomeroy, in discussing this rule, aptly says: "It assumes that the suitor asking the aid of a court of equity has himself been guilty of conduct in violation of the fundamental conception of equity jurisprudence, and therefore refuses him all

recognition and relief with reference to the subject matter or transaction in question." (1 Pomeroy's Equity Jurisprudence, sec. 397.)

But if the injunction had been properly obtained, and the writ had been served on all the parties defendant in that proceeding prior to the sale, still the sale would not therefore have been void, but simply voidable. (*Bagley v. Ward*, 37 Cal. 121; 99 Am. Dec. 256.) In such case, upon a proper showing by a party entitled to the consideration of a court of equity, relief may be granted by setting aside such sale. Otherwise it will be allowed to stand.

The appeal being upon the judgment-roll, the findings are assumed to be supported by the evidence, and such findings not only fail to show that the plaintiff was entitled to relief, but, on the contrary, justify the action of the trial court in awarding judgment for the defendant bank.

Judgment affirmed.

Harrison, J., and Garoutte, J., concurred.

[S. F. No. 1167. Department One.—July 28, 1899.]

LONDON AND SAN FRANCISCO BANK, LIMITED, Respondent, v. LOUIS B. PARROTT et al., Defendants.
ABBY M. PARROTT et al., Appellants.

BANKS—LETTER OF CREDIT AND GUARANTY—NOTICE.—A written instrument requesting a bank to give continued credit to a third party in a specified amount and continually guaranteeing the payment of the original and future credits, and the continuance or renewal of liability therefor, to the extent of such specified amount, in proportionate sums by the subscribers, is both a letter of credit within sections 2858 and 2865 of the Civil Code, and an absolute guaranty within section 2795 of that code; and the subscribers are not entitled to notice of the credits and liabilities thereafter given or incurred, nor to notice of the acceptance of the guaranty.

ID.—CONSTRUCTION OF CODE—COMMUNICATION OF CONSENT—ABSOLUTE GUARANTY—GENERAL AND SPECIFIC PROVISIONS—CONFLICT.—The general provisions of section 1565 of the Civil Code, in the title on contracts, requiring the consent of parties to a contract to be "communicated by each to the other," have no application to the special contract of absolute guaranty to another person of the

debt or default of a third person, provided for in the separate title upon guaranty; but the conflicting provision of section 2975 in the latter title, dispensing with notice of the acceptance of an absolute guaranty, must control upon that subject.

ID.—LIABILITY OF GRANTOR—CONSTRUCTION OF GUARANTY.—The rule that a guarantor is entitled to stand upon the strict terms of his contract, imports merely that his liability is not to be extended by implication beyond its terms as ascertained by the same rules of construction which apply to other written instruments.

ID.—REASONABLE INTERPRETATION—AMBIGUITY OF TERMS.—The language used by the guarantor is to receive a fair and reasonable interpretation to effect the objects and purpose of the guaranty; and if it is fairly susceptible of two interpretations, either of which is within the spirit of the guaranty, the guarantor cannot say the guarantee was not justified in acting upon either, or not he should have acted upon one rather than the other.

ID.—ACCEPTANCE OF NOTE BY BANK—GUARANTORS NOT DISCHARGED. The acceptance by the bank of a note for the amount of an existing credit guaranteed, which did not pay the debt, or alter the relation of debtor and creditor, or extend the time of payment, but was payable immediately when executed, and was within the terms of the guaranty which, fairly interpreted, were broad enough to embrace any form of credit, or future liability, or continuance or renewal of liability from the debtor to the bank, did not operate to discharge the grantors.

ID.—NOTE, WHEN NOT PAYMENT.—In the absence of an agreement that a note shall be taken in payment of the debt, or of evidence that such was the intention of the parties, the taking of a note for an existing liability does not constitute a payment or reduction of the amount of the debt.

ID.—EFFECT OF NOTE—ACTION UPON ORIGINAL DEBT.—A note, given for a debt, which is payable immediately, does not suspend the right of action upon the original debt; and suit may be brought thereon at any time, regardless of the note. The note is evidence of the existing debt, and does not change the amount or character of the liability.

ID.—ACCOUNTS OF BANK—CREDIT OF NOTE—CLOSING OF OVERDRAFT ACCOUNT.—The credit of the note upon the accounts of the bank merely for the purpose of closing the overdraft account upon its books, does not change the liability, or reduce the amount of credit received by the maker of the note from the bank. The real account of credit given was not closed by the footing thus made.

ID.—CONSTRUCTION OF AGREED CASE—"FURTHER CREDIT."—An agreed case, stating that after the date of the execution of the note and the crediting of the amount thereof against the overdraft, all de-

posits made by its maker were applied to the payment of checks drawn thereupon, but that, after that date, "no further credit" was asked or given, is to be construed as meaning that no additional credit for overdrafts was asked or given, and not as importing that the liability for credit previously given ceased from that date.

ID.—PERMISSION TO CHECK AGAINST DEPOSITS—LIABILITY OF GUARANTORS.—The permission of the bank to the maker of the note to draw checks against deposits subsequently made, which were not directed to be applied as payment upon the note, did not affect the liability of the guarantors for the amount of the credit evidenced by the note.

ID.—CREDIT GIVEN TO CORPORATION—LIABILITY OF GUARANTORS AS STOCKHOLDERS.—Where the guarantors were stockholders in a corporation whose indebtedness to the bank to a specified amount, was guaranteed by them, and they did not in the guaranty limit their liability as stockholders of the corporation, the bank may not only recover against them upon the guaranty, but also upon their liability as stockholders for their proportionate share of the debt of the corporation to the bank, not exceeding in all the amount of the corporate liability.

ID.—STATUTE OF LIMITATIONS—NOTE OF CORPORATION—LIABILITY OF STOCKHOLDERS FOR ORIGINAL CREDIT.—In applying the statute of limitations to the liability of the stockholders, a note given by the corporation in renewal or continuance of an original credit given to the corporations for overdrafts, is to be disregarded, and the liability of the stockholders is to be deemed created or incurred only by the original credit to the corporation.

ID.—OVERDRAFT ACCOUNT—DEPOSITS—APPLICATION OF PAYMENTS.—Where the original credit to the corporation was for overdrafts allowed by the bank, the deposits made by the corporation from time to time, of which no application was made by either party, must be made by the court, as of the date of each of the several deposits, in payment, first of the interest then due, and the remainder in payment of the principle, evidenced by checks for the overdrafts earliest in date, irrespective of the statute of limitations thereupon.

ID.—MAKING OF NOTE—AGREED APPLICATION OF PAYMENTS.—The statute of limitations not having run against any items of the account at the time of the execution of the note, it was competent for the parties at that time to agree to the application of the deposits theretofore made, and the making and acceptance of the note for the amount agreed must be regarded as an agreement for the application of the deposits to the extinction of so much of the liability theretofore incurred as was not included in the note.

ID.—CHARGES OF MONTHLY INTEREST—PAYMENT BY BANK—ADDITIONAL LOAN.—The charges by the bank for monthly interest upon the overdrafts, which were paid by memorandum checks signed

by the bank itself, were equivalent to an additional loan or advance of an amount equal to the monthly interest; and cannot affect the application of payments upon the general account to the unpaid interest.

ID.—SIMULTANEOUS DEPOSITS AND CHECKS—FINDING.—The mere fact that the amount of deposits and checks upon a given date were identical in amount, does not of itself conclusively prove that these were independent transactions not subject to the rule for the application of payments in the general account to the earliest items thereof; and the finding of the court to the contrary will not be disturbed upon appeal.

ID.—PRESUMPTION AS TO DEPOSITS AND CHECKS.—Deposits in a bank, being usually made before checks are drawn, in the absence of specific direction, are presumed to be applicable upon general account; and there is no presumption that such deposit was intended to be applied to a check that might thereafter be drawn.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. J. M. Seawell, Judge.

The facts are stated in the opinion of the court.

Robert Y. Hayne, for Appellant.

The defendants, being liable for their guaranty for an amount proportioned to their shares in the corporation, ought not to be subjected to a double liability in an additional amount as stockholders. The guaranty cannot be extended by implication. This is a universal rule applicable to every variety of circumstances. (Brandt on Suretyship and Guaranty, sec. 79; *Pierce v. Whiting*, 63 Cal. 543; *John Hancock Mut. Life Ins. Co. v. Lowenberg*, 120 N. Y. 44.) The substitution of the note for the credit guaranteed discharged the sureties, independently of any injury resulting therefrom. (Civ. Code, sec. 2819, first part; *Page v. Krekey*, 137 N. Y. 314, 315; 33 Am. St. Rep. 731; *Bethune v. Dozier*, 10 Ga. 235; *Haden v. Brown*, 18 Ala. 641; *Miller v. Stewart*, 9 Wheat. 703; *Weir Plow Co. v. Walmsley*, 110 Ind. 246; *Paine v. Jones*, 76 N. Y. 278, 279; *United States v. Hillegas*, 3 Wash. C. C. 76; *Ryan v. Morton*, 65 Tex. 260; *Simonson v. Thori*, 36 Minn. 439; *Crescent Brewing Co. v. Handly*, 90 Ala. 488.) The substitution of a negotiable security for a book account is as much a material alteration as it would be to interline words of negotiability in a non-negotiable note. (*Haines v. Dennett*, 11 N. H. 180.) A negotiable note is

more beneficial to the creditor than a book account. (*Myers v. Welles*, 5 Hill, 464; *Andrews v. Marrett*, 58 Me. 540.) The fact that the appellant was a stockholder in the Capital Packing Company does not dispense with the necessity of her consent to a change in her liability as guarantor. (*Pelton v. San Jacinto etc. Co.* 113 Cal. 24, 25; 3 Thompson on Corporations, sec. 2928.) The guaranty not being an absolute or unconditional guaranty of a subsisting debt, but being conditional upon its acceptance thereof, and future action thereunder, notice of its acceptance must have been communicated to make it a binding contract. (Civ. Code, sec. 1565; *Adams v. Jones*, 12 Pet. 213; *Kincheloe v. Holmes*, 7 B. Mon. 7; 45 Am. Dec. 41; *Howe v. Nickels* 22 Me. 176; *Kellogg v. Stockton*, 29 Pa. St. 460; *Coe v. Buehler*, 110 Pa. St. 366; *Central Sav. Bank v. Shine*, 48 Mo. 464; 8 Am. Rep. 112; *Taylor v. Shouse*, 73 Mo. 361; *Singer Mfg. Co. v. Littler*, 56 Iowa, 601; *Taylor v. Wetmore*, 10 Ohio, 395; *Hill v. Calvin*, 4 How. 231; *Tuckerman v. French*, 7 Greenl. 115; *Bradley v. Cary*, 8 Greenl. 234; *Taylor v. McClung*, 2 Houst. 24; *Oaks v. Weller*, 13 Vt. 110; 37 Am. Dec. 538; *Allen v. Pike*, 3 Cush. 238; *Craft v. Isham*, 13 Conn. 32; *Lee v. Dick*, 10 Pet. 482; *Patterson v. Reed*, 7 Watts & S. 144; *Beekman v. Hale*, 17 Johns. 139, 140.) The deposits after September 6, 1893, while the relation of debtor and creditor existed, were in legal effect payments thereupon; and the letting of them out again was in effect reloading the money after it was paid, and discharged the guarantors. (*Eppinger v. Kendrick*; 114 Cal. 626; *Kiessig v. Alspaugh*, 91 Cal. 233; *People v. Chisholm*, 8 Cal. 29; *Everly v. Rice* 20 Pa. St. 297; *Ruble v. Norman*, 7 Bush, 582; *Spurgeon v. Smytha*, 11 Ind. 453; *Springer v. Toothaker*, 43 Me. 381; 69 Am. Dec. 66; *Commonwealth v. Miller*, 8 Serg. & R. 452; *Nelson v. Williams*, 2 Dev. & B. Eq. 118.) The extension of time by the corporation did not extend the statute of limitations against the stockholders. (*Hunt v. Ward*, 99 Cal. 612; 37 Am. St. Rep. 87; *Winona Wagon Co. v. Bull*, 108 Cal. 1.) All items of the account more than three years prior in date to the commencement of the action were barred by limitation. (*Wells v. Black*, 117 Cal. 163; 59 Am. St. Rep. 162.) The bank has charged compound interest on the account, and having made such application of the interest it cannot be re-

voked for any other application of payments thereto. (Civ. Code, sec. 1479; *Wendt v. Ross*, 33 Cal. 657; *Wright v. Wright*, 72 N. Y. 153; *Mayor etc. v. Patten*, 4 Cranch, 320; *Caldwell v. Wentworth*, 16 N. H. 318; *Hubbell v. Flint*, 15 Gray, 550; *Tomlinson Carriage Co. v. Kinsella*, 31 Conn. 268; *Treadwell v. Moore*, 34 Me. 115; *Feldman v. Gamble*, 26 N. J. Eq. 494.) The principal being barred, the interest is barred also. (*Jones v. Orton*, 65 Wis. 10; *Meyer v. Porter*, 65 Cal. 67.) The credits growing out of particular transactions of deposits and checks, of the same amount on the same day, should not be applied as payment on prior indebtedness. (*Suter v. Ives*, 47 Md. 540.) Where money is received for a defined use it must be applied to that use, and not applied to the payment of previous indebtedness. (*Smuller v. Union Canal Co.*, 37 Pa. St. 70; *United States Bank v. Macalester*, 9 Pa. St. 482; *Taylor v. Cockrell*, 80 Ala. 238.) The payment of a precise amount applicable to a particular claim is irrefragable evidence that it was so intended. (*Marryatts v. White*, 2 Stark, 91; *West Branch Bank v. Moorehead*, 5 Watts & S. 542; *Lauten v. Rowan*, 59 N. H. 215; *Robert v. Garnie*, 3 Caines, 15; *Seymour v. Van Slyck*, 8 Wend. 416, 417.) The law will not appropriate payments to uncollectible demands. (*Stanley v. Westrop*, 16 Tex. 203; *Backman v. Wright*, 27 Vt. 187; 65 Am. Dec. 187; *Quigley v. Duffy*, 52 Iowa, 610; *Dunbar v. Garrity*, 58 N. H. 575; *Wright v. Laing*, 3 Barn. & C. 165; *Kuker v. McIntyre*, 43 S. C. 117.) Nor to a claim barred by limitation. (*Livermore v. Rand*, 26 N. H. 85.)

Page & Eells, and Page, McCutchen & Eells, for Respondent.

The guaranty was an independent agreement, and could not affect the liability of the stockholders for their proportionate share of the indebtedness of the corporation. (*Morrow v. Superior Court*, 64 Cal. 384; *In re California Mut. Ins. Co.* 81 Cal. 368; *Pelton v. San Jacinto Co.*, 113 Cal. 331; *Coburn v. Wheelock*, 34 N. Y. 440.) The acceptance of the note did not discharge the guarantors, it being provided for by a reasonable construction of the guaranty. (*Lawrence v. McCalmont*, 2 How. 426, 450; *Lafargue v. Harrison*, 70 Cal. 385; 59 Am. Rep. 416; *Pratt v. Matthews*, 24 Hun. 388; *People v. Breyfogle*, 17 Cal. 508; *Fifth Nat. Bank v. Woolsey*, 48 N. Y. Supp. 148; 31 Hun's App. Div. 61.)

Ambiguity should be resolved against a surety or guarantor. (*Laurence v. McCalmont supra*; *Belloni v. Freeborn*, 63 N. Y. 383; 13 Am. & Eng. Ency. of Law, 250.) The taking of the note did not constitute a payment or novation of the debt, in the absence of proof of an agreement to the contrary. (*Dellapiazza v. Foley*, 112 Cal. 380; *Savings etc. Soc. v. Burnett*, 103 Cal. 514; *Comptoir d'Escompte v. Dresbach*, 78 Cal. 15; *Fifth Nat. Bank v. Woolsey, supra*.) The letter of credit and guaranty were absolute and unconditional in form, and required no notice. (Civ. Code, secs. 2795, 2865; *Union Bank v. Coster*, 3 N. Y. 204; 53 Am. Dec. 280; *Smith v. Dann*, 6 Hill, 543; *Douglass v. Howland*, 24 Wend. 50; Wade on Law of Notice, secs. 388, 401-05; *City Nat. Bank v. Phelps*, 86 N. Y. 484, 493; *Niles Tool Works v. Reynolds*, 38 N. Y. Supp. 1028; 4 N. Y. App. Div. 24.) After the nominal closing of the account of overdrafts by the note, it was competent for the parties to agree that future deposits should be checked out without additional credit, and the bank was not required to apply them in payment of the debt for the benefit of the sureties or guarantors. (*National Bank v. Peck*, 127 Mass. 300; 34 Am. Rep. 368; *Glazier v. Douglass*, 32 Conn. 393; *Brewer v. Knapp*, 1 Pick. 332; *Upham v. Lefavour*, 11 Met. 174; *People's Bank v. Lagrand*, 103 Pa. St. 309; 49 Am. Rep. 126; *Strong v. Foster*, 17 Com. B. 201; *Voss v. German Bank*, 83 Ill. 599; 25 Am. Rep. 415; *Second Nat. Bank v. Hill*, 76 Ind. 223; 40 Am. Rep. 239; *National Bank v. Smith*, 66 N. Y. 271; 23 Am. Rep. 48.) All deposits on this new account were loans to the bank to be repaid by honoring the depositor's checks. The bank was "not entitled to debit his account with any payments except such as are made by his order and direction." (*Janin v. London etc. Bank*, 92 Cal. 22; 27 Am. St. Rep. 82; *Crawford v. West Side Bank*, 100 N. Y. 50; 53 Am. Rep. 152; Morse on Banks and Banking, sec. 289.) The three years' period rules as to the limitation of the liability of stockholders, and not the two years' period upon items of an open account, though the latter was available to the corporation, if it had not executed the note. (*Green v. Beckman*, 59 Cal. 545; *Wells v. Black*, 117 Cal. 157; 59 Am. St. Rep. 162; *Bank v. Pacific Coast etc. Co.*, 103 Cal. 594; *Hunt v. Ward*, 99 Cal. 614; 37 Am. St. Rep. 87; *Moore v. Boyd*, 74 Cal. 167.) The

application of payments, first to the interest, and then to the earliest items of the principal was correct. (*Redington v. Cornwell*, 90 Cal. 49, 64.)

HARRISON, J.—The defendants in the above entitled cause (with others) executed and delivered to the plaintiff, September 30, 1891, the following instrument:

“To the London and San Francisco Bank, Lt’d. San Francisco, California:

“You will please give credit to the Capitol Packing Company for a sum of money in United States gold coin not exceeding the amount of one hundred thousand (\$100,000) dollars; and as said packing company contemplates a course of future dealing with you, you will please continue the said credit, or, if it should be reduced or satisfied by payments made by said packing company, renew the same from time to time for said amount, or any less sum, or otherwise keep the said credit permanently up to the limit as aforesaid or any less amount.

“And these presents shall be deemed to be, and shall constitute to you, a continuing guaranty by each of us in the several proportions stated below, in reference to, and embracing, the original credit hereby authorized and all future liabilities of said packing company to you under said original credit, and under such successive transactions with you as shall either continue its liability or from time to time renew it; and such guaranty shall remain and be operative until all present or future credit or credits given by you as aforesaid, not exceeding the said limited amount, shall be fully paid, subject to our legal right to revoke the same in writing at any time as to any transactions occurring after such revocation.

“The subscribers hereto do hereby severally guarantee the said credits to the amount of one hundred thousand (\$100,000) dollars, in the following proportions, namely: . . . Thomas Cole, for another twenty-five six-hundredths (25-600) part thereof; Abby M. Parrott, for another one hundred and sixty-five six-hundredths (165-600) part thereof.

“This guaranty shall bind each subscriber for his said proportion of said total credit (until after such revocation by him), notwithstanding some part of said total credit shall not be hereby guaranteed.

“Dated San Francisco, September 30, 1891.”

October 5, 1891; the Capitol Packing Company opened an account with the plaintiff, and thereafter, until August 30, 1894, made deposits of moneys for its said account, drew checks against the same, and received advances by way of loans from said bank, which said advances were, by the said packing company's agreement with said bank, to draw interest, payable monthly, at the rate of seven per cent per annum. In July, 1893, the San Francisco Clearing House, of which the plaintiff was a member, promulgated a rule for the government of its members, that they should not allow overdrafts on the part of their customers; and for the purpose of complying with this rule the Capitol Packing Company, at the request of the plaintiff, delivered to it on the sixth day of September, its promissory note for the sum of \$73,000 bearing date August 31, 1893, and payable one day after date. At that time the books of the bank showed an indebtedness on the part of the packing company of \$72,899.61. This note was not accepted by the bank as payment, but its amount was placed upon the credit side of the packing company's account, and was so entered for the purpose of closing on its books the overdraft of the packing company, under the aforesaid rule of the clearing house. A balance was struck in the account, and the difference, viz., \$100.39, was carried to the credit column of the account, the account was continued upon the books, and the packing company continued to make deposits and draw checks against the same until August 30, 1894, when it was finally closed. On July 31, 1895, the total amount due to the bank, as shown by the accounts upon its books, was \$78,110, being the aforesaid sum of \$73,000 and interest thereon for one year. An agreed case containing the above facts and others hereinafter named was submitted to the superior court for its determination, the plaintiff claiming therefrom a right of recovery against the defendants, and they claiming to be under no liability by reason thereof. The superior court rendered its judgment in favor of the plaintiff, from which the present appeal has been taken.

1. The instrument of September 30, 1891, is both a letter of credit and a guaranty. The first portion thereof is a written instrument addressed by the appellants to the respondent,

requesting the latter to give credit to the Capitol Packing Company, and thus falls directly within the terms of section 2858 of the Civil Code; and in the subsequent portion thereof they guarantee the said credit to the amount of \$100,000, in certain specific proportions, and declare that the same shall be a continuing guaranty by each of them in these proportions, until the credit that may be given shall be fully paid. Regarded as a letter of credit, the terms of the instrument do not require any notice of the credit thereafter given, nor can the necessity of giving such notice be implied from its terms; and under section 2865 they became liable for such credit without notice to them. Their guaranty of the credits that might be given thereafter contains no limitation and is unconditional. It is not an offer to guarantee—its language being that they “do hereby severally guaranteé the said credits”—but is an absolute guaranty, and, under section 2795 of the Civil Code, became binding upon them without any notice of acceptance. The provisions of section 1565 of the Civil Code, cited by the appellants, requiring the consent of parties to a contract to be “communicated by each to the other,” has no application to a contract by which one person makes an absolute guaranty to another of the debt or default of a third person. It is a cardinal rule of statutory construction that specific provisions upon a particular subject control general provisions for the class to which that subject belongs. (Endlich on Interpretation of Statutes, sec. 399.) Section 1565 of the Civil Code refers to contracts in general, and is found in title I, of part II of that code, while the sections relating to “Guaranty” are contained in title XIII, of part III of the same code. Section 4481 of the Political Code declares: “If the provisions of any title conflict with or contravene the provisions of another title, the provisions of each title must prevail as to all matters and questions arising out of the subject matter of such title.”

It is claimed by the appellants that the acceptance by the bank of the promissory note for \$73,000 was such an alteration of the relation between it and the packing company as to discharge the guarantors, and in support thereof they invoke the oft-cited rule that a surety or a guarantor is entitled to stand upon the strict terms of his contract. When it is said

that a guarantor is entitled to stand upon the strict terms of his guaranty, nothing more is intended than that he is not to be held liable for anything that is not within the express terms of the instrument in which his guaranty is contained; that his liability is not to be extended by implication beyond these limits, or to other subjects than those expressed in the instrument of guaranty. But for the purpose of ascertaining the meaning of the language which he has used, and thus determining the extent of his guaranty, the same rules of construction are to be applied as are applied in the construction of other written instruments. His liability is not to be extended by implication beyond the terms of his guaranty as thus ascertained. The language used by him is, however, to receive a fair and reasonable interpretation for the purpose of effecting the objects for which he made the instrument, and the purpose to which it was to be applied. If this language is fairly susceptible of two interpretations, either of which is within the spirit of the guaranty, he is not at liberty to say that the person to whom it is given was not justified in acting upon either, or that he should have acted upon one rather than the other. (Civ. Code, sec. 1654; *Bell v. Bruen*, 1 How. 169; *Lawrence v. McCalmont*, 2 How. 426; *Gates v. McKee*, 13 N. Y. 232; 64 Am. Dec. 545; *Powers v. Clarke*, 127 N. Y. 417; *Pratt v. Matthews*, 24 Hun, 386; *Smith v. Molleson*, 148 N. Y. 241; *Lefargue v. Harrison*, 70 Cal. 380; 59 Am. Rep. 416.)

The taking of the note by the bank did not discharge the appellants from their liability upon the guaranty unless the obligation which they had guaranteed was thereby changed. By the terms of the instrument of guaranty the bank was to give to the packing company "credit" to the amount of \$100,000, and to "continue the said credit," or, if it should be "reduced or satisfied by payments," renew the same, or otherwise keep the said "credit" permanently up to the limit aforesaid, or any less amount; and the signers thereof agreed that the instrument should be a continuing guaranty in reference to and embracing the original credit thereby authorized, "and all future liabilities of said packing company under said original credit," and under such successive transactions as shall either "continue its liability, or from time to time renew it," until all present or future credit or credits "shall

be fully paid." The instrument does not designate the form in which the credit should be given and its language is broad enough to embrace any form of credit which might be agreed upon between the bank and the packing company; nor is there any language therein which limits the guaranty, or the credit to be given, to the form which might be originally adopted, or to preclude the bank and the packing company from the right to change the form of such credit, or from adopting at the same time different forms of credit without impairing the guaranty. It may be conceded that if after the bank had given credit to the packing company by way of an open account for its overdrafts, payable on demand, it had accepted a promissory note therefor by which its right to demand immediate payment would be postponed to a future day, the guarantors would have been discharged, since in that case the contract guaranteed by them would have been changed by giving time to the debtor and preventing them from taking up the debt and immediately suing the packing company. It is stated, however, in the agreed case that the note was not taken by the bank as payment, and, therefore, the original credit given to the packing company was not thereby "reduced or satisfied." In the absence of an agreement to that effect, or evidence that such was the intention of the parties, the taking of a note for an existing liability does not constitute a payment of the debt. (*Dellapiazza v. Foley*, 112 Cal. 380; *Grangers' Bank v. Shuey* (Cal. Dec. 15 1898); 17 Cal. Dec. 1.) In the present case, the note was not delivered to the bank until after its date, and was therefore payable immediately, and the bank could at any time bring its action upon the original overdrafts.

The giving of the promissory note was a transaction between the bank and the packing company which at least had the effect to "continue" its liability for the amount of its previous overdrafts, and was within the express terms of the guaranty. It was evidence of the extent of the credit existing at that time, but did not change the amount or character of the liability. If, instead of taking the note, the bank had at that time sued the packing company and obtained judgment against it for the amount of its overdrafts, the guarantors would not have been thereby discharged, and the taking from it of a written agreement to pay the amount of the overdraft

can have no greater effect in discharging them. There was but one account opened with the bank by the packing company, and this account was not finally closed until August 30, 1894; and the entry of the amount of the note to the credit of the packing company upon this account was made merely for the purpose of closing the "overdraft" upon its books, but did not change the liability of the packing company, or reduce the amount of the credit which it had received from the bank. An account is not closed at each time a footing is made and the balance carried to another column. In support of these propositions, the following authorities may be consulted: (*Bush v. Critchfield*, 5 Ohio, 109; *Wise v. Miller*, 45 Ohio St. 388; *Fifth Nat. Bank v. Woolsey*, 31 N. Y. App. Div. 61; *Norton v. Eastman*, 4 Greenl. 521; *Lennox v. Murphy*, 171 Mass. 370; *London etc. Bank v. Bandmann*, 120 Cal. 220; 65 Am. St. Rep. 179.)

It is stated in the agreed case, after reciting the making of the aforesaid note and crediting its amount against the overdraft: "After that time, viz., on and after September 6, 1893, the company continued to make deposits and to check against the same as is shown by the statement hereto annexed, marked 'Exhibit 2.' But after September 6, 1893, no further credit was asked by or given to the packing company. All deposits so made were applied by the bank to the checks drawn after the date last mentioned, until August 30, 1894, when the said account was finally closed." Upon this statement it is contended by the appellants that their liability as guarantors ceased September 6, 1893; that as after that date the bank gave no further credit to the packing company, the liability of the guarantors ceased at that date. We cannot assent to this construction of the above clause. The argument of the appellants is drawn from what we deem a misconstruction of the language used in the agreed case. The statement that after September 6th no further credit was given to the packing company is not equivalent to a statement that credit was not given to it after that date. The word "further" as here employed, is an adjective, used in the sense of "additional," limiting "credit," and is not to be construed as an adverb of time, qualifying the word "given"; and the phrase is to be construed as meaning that after that date

the bank gave no credit to the packing company beyond, or in addition to, the amount of the note. The sentence itself is introduced by the restrictive connective "But," and its apparent purpose is to limit the statement in the previous sentence that after that date "the company continued to make deposits and to check against the same," by declaring that, notwithstanding the checks drawn against the deposits, they did not of themselves result in giving any credit to the packing company. This construction is consistent with the fact, appearing upon the face of the account, which is referred to in the sentence, that after that date there were no further overdrafts—the deposits being at all time in excess of the checks—and also harmonizes with the effect which we hold is to be given to the transaction of accepting the note and placing its amount to the credit of the packing company's account.

Permitting the packing company to draw checks against the deposits made by it after September 6, 1893, did not affect the liability of the guarantors. The moneys so deposited were not directed to be applied as payments upon the note, and in the absence of any direction the bank was not required to make such application. A bank which holds the note of its customer is not required at its maturity, or thereafter, to apply thereon moneys subsequently deposited by the customer, and an endorser or surety upon the note is not discharged by its omission to make such application. (Morse on Banks and Banking, sec. 562; *First Nat. Bank v. Peltz*, 176 Pa. St. 513; 53 Am. St. Rep. 686; *National Mahaiwe Bank v. Peck*, 127 Mass. 298; 34 Am. Rep. 368; *Strong v. Foster*, 17 Com. B. 201.) And if the bank was not required to make such application, its payment of checks drawn subsequent to the deposits was not a reloaning to the packing company of money that should have been applied toward the payment of the note. As we hold that the "credit" which was guaranteed did not cease on the 6th of September, but continued from the time it was opened with the bank in October, 1891, it is immaterial, so far as the guarantors are concerned, whether the deposits made after that date were applied in reduction of the amount of the note, or in payment of checks subsequently drawn. The liability of the

packing company which they guaranteed was whatever amount of credit less than \$100,000 might at any time exist in favor of the bank, whether in the form of an open account for overdrafts, or in the nature of bills receivable. As between the bank and the packing company, all the payments of its checks by the bank upon overdrafts constituted "credit," and all of the deposits by the packing company were payments to be applied in "reducing or satisfying" that credit, and whatever amount of such credit remained unpaid was within the terms of the guaranty.

2. The Capitol Packing Company is a corporation organized under the laws of this state, with a capital stock divided into 600 shares, of which 595 were issued, and during all the times in which the aforesaid liability of the corporation was incurred the appellant, Abby M. Parrott, was the owner and holder of 165 shares of said stock, and the appellant, Thomas Cole, of 25 shares. The plaintiff claims, in addition to a recovery upon the guaranty of the appellants, the right to recover from them respectively, as stockholders, their proportion of the aforesaid corporate obligation and the superior court rendered judgment in its favor in accordance with this claim. The appellants contend that their guaranty was only a collateral security for their liability as stockholders; that their liability thereon was commensurate with their liability as stockholders, and that the court was not authorized to render judgment against them in their double capacity.

In the agreed case the liability of the packing company to the plaintiff is stated to be \$78,110, and it is stated that the plaintiff claims the right to recover from Mrs. Parrott upon her stockholder's liability the sum of \$21,844.32, and upon her liability as guarantor the sum of \$10,922.16; and from Mr. Cole upon his liability as stockholder the sum of \$3,309.75, and upon his guaranty the sum of \$1,323.89. The aggregate amount of the judgments against the defendants is less than the agreed amount of the corporate liability, but the judgments do not specify the amounts thereof rendered against the appellants upon their respective liabilities as guarantors and as stockholders. No exception, however, is made upon this ground, nor do the appellants claim that the judgment against them is incorrect in amount—their claim being that by reason of the guaranty they are not liable in any

amount as stockholders. The guaranty does not, however, contain any reference to the liability of the signers as stockholders, and, inasmuch as such liability is distinct from that arising upon their contract, if they had intended not to be bound as stockholders they should have caused words of release or limitation to be inserted in the guaranty. Their liability as stockholders existed by virtue of the statute while their liability as guarantors was purely a matter of contract between them and the plaintiff, and the plaintiff had the right to demand the guaranty, in addition to their liability as stockholders, as a condition upon which it would give credit to the corporation. There was no connection between the two, or dependence of one upon the other, and, in the absence of any agreement to that effect, the plaintiff is not to be deprived of the right to enforce their statutory liability. No inference of this nature is to be drawn from the similarity between the number of shares of stock held by the appellants, and the proportion of the credit which they guaranteed. In fact, their liabilities under the two obligations are not the same—that as guarantors being for a certain number of six-hundredths of the credit, while as stockholders they were liable for that number of five hundred and ninetieths.

The plaintiff is, of course, not entitled to recover from the defendants whether as guarantors or as stockholders, or in both capacities, more than the amount of the corporate liability, but, as it appears from the record that the aggregate amount of the judgments is less than the agreed amount of the corporate liability, we cannot say that the record discloses any error in this respect. It is also stated in the agreed case that some stockholders did not sign the guaranty, and that some of the guarantors were not stockholders. The case also shows that the defendants in the action had 290 shares of the stock, but it does not appear that any of the guarantors, other than the defendants, were stockholders.

It is stated in the agreed case that the defendants shall be considered as having pleaded the statute of limitations upon any other matter than the guaranty, and appellants contend that their liability as stockholders is barred by this statute. The liability of a stockholder is an obligation created by statute, and, under section 359 of the Code of Civil Procedure,

is barred unless the action thereon is commenced within three years after the cause of action accrues. (*Green v. Beckman*, 59 Cal. 545; *Moore v. Boyd*, 74 Cal. 167; *Wells v. Black*, 117 Cal. 157; 59 Am. St. Rep. 162.) It is unnecessary to consider the proposition presented by the appellants, that if the liability of a corporation is barred by the statute the stockholders may avail themselves of that fact as a defense to their own liability, since in the present case the liability of the packing company was not barred. Before the statute had run against its liability it made its written acknowledgment thereof and promised to pay the same, and thus prevented the bar of the statute. The giving of this note had the effect to preserve its liability until the maturity of the note. The plaintiff's claim against the appellants as stockholders is not upon the note, but upon the liability originally created by reason of the advances made to the corporation. We have seen that the giving of this note did not affect the liability of the appellants upon their guaranty, since it did not affect the original liability of the corporation, and for the same reason it did not affect their liability as stockholders.

Neither is their liability as stockholders barred by the three years' statute. The account with the packing company was opened October 5, 1891, and from that date until September 5, 1893, deposits were made by the packing company, from time to time, and its checks paid by the bank. Section 1479 of the Civil Code, providing for the application of payments, declares: "3. If neither party makes such application within the time prescribed herein, the performance (*i. e.*, the payment) must be applied to the extinction of obligations in the following order: 1. Of interest due at the time of performance; 2. Of principal due at that time."

The superior court acted in accordance with this rule, and held that the deposits of the packing company should be applied, first, to the interest due at the time of making the several deposits, and next to the payment of the checks earliest in time, and that the application should be made as of the date of the several deposits, irrespective of the time that had elapsed between the earliest items and the commencement of the action. The appellants claim that the

court thus acted in disregard of their plea of the statute of limitations; that under this plea the court was not at liberty to apply any of the deposits in discharge of advances made more than three years prior to the time the application was made; that the application of the deposits, whether made by the court or the creditor, cannot be made after three years from the time that the liability accrued. We cannot assent to this proposition. Under section 462 of the Code of Civil Procedure the plea of the statute of limitations is to be deemed "controverted" by the plaintiff, and whatever will defeat its effect may be shown upon the trial. The right to a correct application of payments is one of the elements in the plaintiff's right of action, and he is not to be deprived of the exercise of that right by a delay in bringing his action on for trial. The application of payments which is made by the court is to be made "in such a manner, in view of all the circumstances of the case, as is most in accordance with justice and equity, and will best protect and maintain the rights of both parties." (*Murdock v. Clarke*, 88 Cal. 390.) The circumstances which are to guide the court may have arisen since the payment was made, but the application when made relates to the time of the payment. There could be no propriety in applying a payment to the discharge of an obligation incurred subsequent to the time when the payment was made.

It is next contended by the appellants that under their plea of the statute their liability as stockholders is limited to that portion of the corporate liabilities which were incurred subsequent to August 16, 1892—the agreed case having been filed August 15, 1895. At the time of the execution of the note of September 5, 1893, the statute of limitations had not run against any of the items of the account; and the parties thereto could at that time agree upon the mode and extent to which the previous deposits by the packing company should be applied in the extinction of its liability for the advances; and the making and acceptance of the note for an amount agreed upon between them must be regarded as an agreement, or acquiescence, on the part of the packing company, in their application to the extinction thereby of so much of the liability theretofore incurred as was not included in the note.

The appellants urge, however, that the plaintiff had, prior to that date, made an appropriation of a portion of the deposits to the payment of interest at the end of each month, and that the appropriation having once been made it was irrevocable, and that a different appropriation thereafter was unauthorized. This claim rests upon these facts: At the opening of the account the packing company agreed to pay interest upon the advances made to it, monthly, at the rate of seven per cent per annum. This interest upon overdrafts was, according to the usual course of business, paid by a memorandum check signed by the bank itself, and a list of the checks so drawn was handed to the packing company whenever its book was balanced. In the account upon the books of the bank these items of interest appear under date of the last day of each month, and amount to a little over \$7,000. It is claimed that by this mode the bank elected to allow the interest to compound and not to apply any subsequent deposits to its payment. Instead, however, of being an application of the deposits, this action of the bank was in the nature of an additional loan to the packing company. It was equivalent to advancing to it the amount of the interest for the previous month, upon its check therefor, in the same mode that it would advance money upon its check for any other purpose. Deposits subsequently made were not applied by the bank to the payment of this interest, but were placed to the general credit of the packing company in its account upon the books of the bank.

From the copy of the account annexed to the agreed case it appears that upon many occasions the amount of the deposits and of the checks drawn by the packing company upon the same day were identical, and from this fact the appellants contend that it should be held that these deposits and checks were parts of the same transaction, and were transactions independent of the general account between the packing company and the bank, and consequently the deposits so made should not be applied to the discharge of any of the earlier items of the account. There is nothing, however, in the record tending to show that these were independent transactions except the identity of amount and date, and these items only constitute evidence from which an inference might be drawn that they were parts of independent

transactions. They are not conclusive of the fact, and as the superior court has not drawn this inference, but its judgment has impliedly found the contrary, we must accept its finding as conclusive. It may be added that in the dealings between a bank and its customers the deposit is usually made before the checks are drawn, and, in the absence of some specific direction, there would be no presumption that a deposit was intended to be applied to a check that might be thereafter drawn.

The judgment is affirmed.

Garoutte, J., and Van Dyke, J., concurred.

Hearing in Bank denied.

[S. F. No. 1388. Department Two.—July 28, 1899.]

EZRA REED, Executor, etc., Appellant, v. ELIZABETH L. SMITH and J. D. SMITH, Respondents.

DEED FROM FATHER TO DAUGHTER—DELIVERY—SUPPORT OF FINDING.—

The evidence reviewed, and held sufficient to support a finding that a deed of the home place from a father to his daughter was delivered to her by him during his lifetime.

ID.—MODE OF KEEPING DEED—DEMAND FOR REDELIVERY—LOSS—RECOVERY AFTER DEATH.—Such finding is not overcome by evidence that, after the delivery of the deed, it was kept in the usual manner among papers belonging to both father and daughter, which were subsequently placed together in her valise; that the father, some years thereafter, through opposition to his daughter's marriage, demanded the deed back, and that she could not find the deed or valise containing it; that, after her father's death, she did not set up a claim to the property when his will was read; and that the valise containing the deed and other papers was subsequently found, and the deed recovered by her.

ID.—JOINT OCCUPATION—ADVERSE HOLDING BY FATHER.—The fact that after the execution and delivery of the deed to his daughter, the father remained upon the home place, occupying it with her, did not constitute an adverse holding, prior to the time when he assumed a position hostile to her title.

APPEAL from a judgment of the Superior Court of Men-

docino County and from an order denying a new trial. J. W. Mannon, Judge.

The facts are stated in the opinion of the court.

Henry L. Ford, and J. A. Cooper for Appellant.

The deed practically remained in the possession and control of the grantor, and was not intended to take effect until after his death, and was not therefore operative as a deed. (*Denis v. Velati*, 96 Cal. 223; *Fitch v. Bunch*, 30 Cal. 208; *Stilwell v. Hubbard*, 20 Wend. 44; *Patterson v. Snell*, 67 Me. 559; *Brown v. Brown*, 66 Me. 316-21; *Huey v. Huey*, 65 Mo. 689; *Shurtleff v. Francis*, 118 Mass. 154; *Goodlett v. Kelly*, 74 Ala. 213; *Jackson v. Leek*, 12 Wend. 107; *Fay v. Richardson*, 7 Pick. 91; *Wiggins v. Lusk*, 12 Ill. 132; *Miller v. Physick*, 24 Ark. 244; *Herbert v. Herbert*, Breese, 354; 12 Am. Dec. 192; *Fisher v. Hall*, 41 N. Y. 423; *Phillips v. Houston*, 5 Jones, 302; *Martin v. Ramsey*, 5 Humph, 349; *Jones v. Loveless*, 99 Ind. 317; *Miller v. Lullman*, 81 Mo. 311; *Jones v. Jones*, 6 Conn. 111; 16 Am. Dec. 35.) The father retained exclusive control of the premises, and paid all taxes thereon after the date of the deed; and acquired a prescriptive title as against the deed. (Code Civ. Proc., sec. 321; Civ. Code, sec. 1007; *Garabaldi v. Shattuck*, 70 Cal. 511; *Dorland v. Magilton*, 47 Cal. 485; *Johnston v. Fish*, 105 Cal. 420; 45 Am. St. Rep. 53; *Horn v. Jones*, 28 Cal. 194; *Arrington v. Liscom*, 34 Cal. 365; 94 Am. Dec. 722; *McCormack v. Silsby*, 82 Cal. 73; *Unger v. Mooney*, 63 Cal. 591; 49 Am. Rep. 100.)

T. L. Carothers, for Respondents.

The statute of limitations, or a prescriptive title, was not pleaded, and cannot be relied upon. (*Woodward v. Faris*, 109 Cal. 12.) There was no adverse possession, until after the father ceased to treat his daughter as the owner, and asserted title against her. (*Unger v. Mooney*, 63 Cal. 586; 49 Am. Rep. 100.) There is a presumption of delivery of the executed and acknowledged deed at its date. (Civ. Code, sec. 1055; *Ward v. Dougherty*, 75 Cal. 240; 7 Am. St. Rep. 151; Devlin on Deeds, sec. 294; *Bensley v. Atwill*, 12 Cal. 232; Mc-

Lennan v. McDonnell, 78 Cal. 273.) The proof shows a delivery, and sustains the findings.

McFARLAND, J.—This is an action to quiet title to certain lands described in the complaint. The defendant Elizabeth is the daughter of the deceased Piercy, and the other defendant, J. D. Smith, is her husband. Judgment went for the defendants, from which and from an order denying the motion for a new trial the plaintiff appeals.

The court found that in 1887, at which time the decedent was the owner of the premises, he made, executed, and delivered to the defendant Elizabeth a deed conveying to her the property here involved. Such a deed, purporting to convey the property to her and dated June 21, 1887, was introduced in evidence; and it is not disputed that it was signed by the decedent, or that it was duly acknowledged before a notary public on June 28, 1887. It is denied, however, by appellant that the deed was ever delivered to Elizabeth; and the main question, and substantially the only one in the case, is whether the finding of delivery is supported by the evidence.

The real question to be determined here is whether or not the evidence of the delivery was so slight as to require us to overturn the finding on the ground that there was no sufficient, material evidence to support it; and we cannot come to that conclusion.

Aside from the presumption which arises from the possession of a deed by the grantee, we cannot say that the testimony of the defendant Elizabeth, taken with certain declarations of the decedent, and other matters in evidence, did not warrant the court in finding the fact of delivery. The land in contest contains about eighty-eight acres, and was the "home place" where the decedent and the defendant Elizabeth lived. She did all the housework, and, as one of the witnesses said, did a man's work about the place, taking care of the stock, et cetera. She testified that her father made the deed to her on July 10, 1887; that he had previously told her that he had made the deed to her; that when he came back (from a certain Fourth of July celebration) "he gave me the deed, that was on the 10th of July, 1887"; that "father

handed me the deed and stated that it would be a home for me if anything happened to him. He never said anything to me contrary until I got to going with Mr. Smith. He did not like Mr. Smith"; and that afterward the deed became lost and could not be found. She further testified that her papers and those of her father were kept together, and that the deed was first put into a trunk where both of them had papers, and was afterward put into a valise which belonged to her; but in which her father also had papers, and that afterward it could not be found. It was discovered after the father's death by the witness Alfred Cyphers in a valise in which were papers of both the defendant and the decedent, and given by the witness to his father, Dan Cyphers, who gave it to the said defendant. Plaintiff's witness, Butler, testifies that the decedent "spoke of a deed that he had made of the place, his home place, to Lizzie," and "said that he had made a deed to Lizzie of the house place because he wanted her to stay there with him"; and plaintiff's witness, Yates, testified: "I heard Mr. Piercy speak of having deeded the land to his daughter, Lizzie. It must have been six years ago." It seems that some time after the father had given the deed to his daughter—probably several years afterward, although the record throughout is very indefinite as to time—she commenced to receive attentions from the defendant, J. D. Smith, who is now her husband, and that then the father, who was much opposed to her marrying Smith, became angry with her and demanded the deed, and would not believe her when she said it could not be found.

We cannot say that the above evidence was not sufficient to warrant the court in finding that there had been a delivery. The main objection to its sufficiency is that the deed was kept where there were also some papers of the father; but that was the usual way in which she kept all her papers, and if, as she testified, her father "gave" the deed to her—"handed" it to her, put her in possession of it—the manner, as above stated, in which she afterward kept it is not sufficient to overthrow the finding of delivery. There was little else to contradict defendant's testimony. It is to be observed that the testimony of the plaintiff's witness, Mrs. Butler, is not about anything which Elizabeth said to her, but is composed entire-

ly of what was told her by the decedent. The fact that the defendant did not set up any claim to the property when the will was read is fully explained by her inability at that time to find the deed, and her supposition that without its production it would be useless for her to set up her claim.

Appellant's contention that he showed title by adverse possession during the statutory period of limitation cannot be maintained. Waiving the question whether one claiming title under the statute of limitations must plead it, whether plaintiff or defendant (see *Woodward v. Faris*, 109 Cal. 12), there is no evidence that the decedent held the property, claiming it as his own adversely to the defendant, during the statutory period of limitation. After he made the deed to his daughter, the mere fact that he remained on the land occupying it with her did not constitute an adverse holding as against her prior to the time when, by act or declaration, he assumed a position hostile to her title; and it nowhere appears in the record when he first assumed that hostile position.

The judgment and order appealed from are affirmed.

Henshaw, J., and Temple, J., concurred.

[L. A. No. 391. In Bank.—July 28, 1899.]

COUNTY OF SAN DIEGO, Respondent, v. COUNTY OF
RIVERSIDE, Appellant.

COUNTIES—DIVISION—PRIOR RAILROAD TAXES—IMPROPER REASSESSMENT—RECOVERY OF LOSS.—Upon the division of a county, with an agreed basis of apportionment of assets, which did not include prior unpaid railroad taxes, the validity of which was disputed, and which had not then been reassessed, but which were subsequently improperly reassessed for the previous years to each of the counties, upon the basis of their respective railroad mileage, and paid upon that basis, the original county may recover from the new county the difference between the amount of taxes received by the complainant, and the amount which it would have had, if the taxes had been wholly reassessed to it, and divided between them upon the agreed basis of apportionment, with interest upon such difference.

- ID.—PRESENTATION OF CLAIM.**—The claim for reimbursement having been presented by the original county to the new county for allowance, and wholly rejected, it need not be again presented before bringing an action thereupon.
- ID.—PLEADING—INVALIDITY OF ORIGINAL ASSESSMENTS—GENERAL DEMURRER.**—Where the complaint showed that the railroad taxes were long delinquent, owing to a question as to their validity, and that reassessments made by the state board of equalization were accepted and acted upon by the railroad company by payment of the taxes, it cannot be objected upon general demurrer that the invalidity of the original assessments was not directly alleged.
- ID.—DUTY OF STATE BOARD OF EQUALIZATION—REASSESSMENT AND APPORTIONMENT.**—It is the duty of the state board of equalization, in making a reassessment of railroad taxes, to take the place of an invalid assessment of a previous year, to make their apportionment to the counties as they existed at the time of the invalid assessment, and not at the time of the reassessment.
- ID.—LIEN FOR TAXES NOT CREATED BY ASSESSMENT.**—The lien for the taxes justly leviable upon the property of a railroad company attaches on the first Monday of March in each year, and is not created by the assessment, which is merely one of the steps for the enforcement of the lien; and whenever a valid assessment or reassessment is made for that year, the taxes become payable to the county in which the roadbed was included when the lien attached for the taxes of that year.
- ID.—AMBIGUITY OF COMPLAINT—MISTAKE IN FIGURES.**—The ambiguity of the complaint caused by a mistake in figures, causing a discrepancy of allegation as to the number of miles taxed in the new county, which may be corrected by other figures given in the complaint, cannot be reached upon general demurrer.
- ID.—FAILURE OF COMMISSIONERS TO DIVIDE UNPAID TAXES—ERROR IN FAVOR OF APPELLANT.**—The objection that the commissioners failed to divide the unpaid railroad taxes for previous years, the validity of which was disputed, and which had not then been reassessed, cannot preclude a recovery by the original county of its alleged proper proportion of the taxes received by the new county, when subsequently reassessed and paid. If such failure made a subsequent division impossible the original county would be entitled to recover and keep all the taxes for those years; and the new county, upon appeal, from a judgment for a portion of the taxes improperly received by it, cannot complain of error in its favor.

APPEAL from a judgment of the Superior Court of Los Angeles County. Lucien Shaw, Judge.

The facts are stated in the opinion of the court.

L. Gill, District Attorney of Riverside County, Charles R. Gray, and E. W. Freeman, for Appellant.

A. H. Sweet, District Attorney of San Diego County, Alexander & Hughes, and Goodrich & McCutchen, for Respondent.

BEATTY, C. J.—This action was commenced in the county of Los Angeles to recover certain moneys claimed to have been received by the defendant to the use of plaintiff. Defendant demurred to the complaint upon the grounds of absence of jurisdiction and want of facts. The superior court overruled the demurrer, and, defendant declining to answer, entered judgment for the plaintiff, from which this appeal is prosecuted.

If the facts alleged in the complaint constitute a cause of action, there appears to be no ground upon which the jurisdiction of the court can be successfully assailed.

It appears from the complaint, among other things, that the county of Riverside was created by an act of the legislature, approved March 11, 1893 (Stats. 1893, p. 158), out of territory formerly belonging, part to the county of San Diego and part to the county of San Bernardino, and that commissioners were appointed in pursuance to the provisions of said act to settle and adjust the mutual claims and obligations of the counties of Riverside and San Diego, with respect to the property and existing indebtedness of the latter county; that said commissioners duly organized and afterward made their award, by which it was determined, among other things, that Riverside county should pay to San Diego county the sum of \$2,782.86, and that the net assets of San Diego county, as the same stood at the date of the act creating Riverside county, should be divided between the two counties as follows: 61,087 parts out of 71,087 parts to San Diego county and the remaining 10,000 parts to Riverside county. This ratio of division was subsequently ratified and accepted by the respective boards of supervisors of the two counties, and partly carried out.

Before the creation of Riverside county there were 158.85 miles of railway belonging to the Southern Pacific Company within the county of San Diego upon which the taxes were

delinquent for the years 1880 to 1887, inclusive, no part of which taxes were paid until after reassessment in pursuance of the act of March 23, 1893 (Stats. 1893, p. 290.) The taxes of 1880 to 1885, inclusive, were paid by the railroad company in 1893, and were considered and included in the award of the commissioners, and divided by the supervisors of the respective counties according to the ratio above stated. But the taxes for the years 1886 and 1887 were not then paid and were not considered or in any manner adjusted by said board of commissioners, or by said boards of supervisors. In August, 1894, and subsequent to the award of said commissioners, the taxes of 1886 and 1887 still remaining unpaid, the state board of equalization, in pursuance of said act of March 23, 1893, made reassessments of said 158.85 miles of railway for the years 1886 and 1887, but instead of apportioning and certifying the whole of said assessments to the county of San Diego, as they should have done, they apportioned and certified the assessments upon 71.06 miles to the county of Riverside, that being the number of miles within the territory transferred from the former to the latter county by the act of March 11, 1893. These reassessments were thereafter entered upon the tax rolls of the respective counties, according to the erroneous apportionment of the state board of equalization, and the taxes were paid by the state treasurer (by whom they were collected from the railroad company) to the treasurers of the respective counties, according to the same erroneous apportionment, the result being that, out of the whole amount paid, the county of Riverside received \$7,969.65 more, and San Diego that amount less, than they would have received if the whole amount of said delinquent taxes had been divided according to the ratio established by the commissioners and accepted by the respective boards of supervisors as the basis of division of the net assets of San Diego county.

The county of San Diego accordingly made due demand upon the county of Riverside for said sum, and, payment being refused, brought this action, in which judgment is rendered in its favor for the amount so demanded, with legal interest.

Appellant contends, upon several grounds, that this judgment is not sustained by the allegations of the complaint:

1. It is contended that one presentation only of plaintiff's claim before commencing suit was insufficient in view of the construction placed upon sections 43 and 44 of the County Government Act (Stats. 1893, p. 364) in *Arbios v. County of San Bernardino*, 110 Cal. 553. But neither that decision nor the law construed has any application to a case in which the entire claim has been rejected on the first demand for allowance, which was the case here.

2. It is contended that the county of San Diego can have no claim against San Bernardino county for any of the moneys here in question, because the facts alleged do not constitute a legal basis for a reassessment, and, consequently, that there was no legal obligation upon the part of the railroad company to pay them, or any part of them, to San Diego county. The particular point of this objection is, that it is nowhere alleged in the complaint that the original assessments for 1886 and 1887 had been adjudged invalid, or that they were invalid in fact, whereas such adjudication or such actual invalidity was a necessary condition precedent to a reassessment. It is true that under the act of March 23, 1893, no reassessment was authorized, except in case of an invalid assessment, and it is true that there is in this complaint no direct allegation that the railroad assessments for the years 1886 and 1887 were invalid. It does appear, however, that the taxes for those years had been delinquent for a long period, owing to a question as to the validity of the assessments, and that the state board of equalization had made reassessments which were accepted and acted upon by the county and by the railroad company by payment and receipt of the taxes levied thereon. As against a general demurrer, I think these allegations sufficient to show a lawful reassessment and rightful claim on the part of San Diego to any taxes justly apportionable to that county.

3. It is contended that if the state board of equalization had the power to make these reassessments, they were required by section 10 of article XIII, of the constitution, to make the apportionment to Riverside county as they did make it. That section provides that "the franchise, roadway, . . . of all railroads operated in more than one county in this state shall be assessed by the state board of equalization

at their actual value, and the same shall be apportioned to the counties, cities, . . . in which such railroads are situated in proportion to the number of miles of railway laid in such counties, cities," et cetera. Under this provision of the constitution the state board of equalization, making a reassessment in 1894 to take the place of an invalid assessment for the year 1886 or 1887, were required to make their apportionment to the counties as they existed in 1886 or 1887, not as they existed in 1894.

4. It is contended that if the original assessments for 1886 and 1887 were invalid, then there was no valid lien for the taxes until the reassessment in 1894, and that Riverside county, having been created in the meantime, the taxes on that portion of the railroad within Riverside county accrued to and were payable to it. But the assessment does not create the lien. It is merely one of the steps for its enforcement. The lien for the taxes justly leviable upon the property of a railroad company attaches on the first Monday of March in each year, and the obligation to pay necessarily accrues at the same time, if not earlier. Payment is not due, of course, until the assessment has been made; but, when that has been done and the amount of the taxes ascertained, it is payable to the county in which the roadbed was included at the time when the lien attached.

5. There is an evident mistake in the complaint where it is alleged that the money paid to Riverside county was the tax upon 92.60 miles of railway. Taking all the allegations of the complaint together, it clearly appears that in the territory transferred from San Diego county to Riverside there were 71.06 miles of road, and in the territory transferred from San Bernardino county there were 21.54 miles, making in all 92.60 miles. These figures have been used in two places instead of the correct figures, 71.06, but by computation from the figures given in the complaint it is readily shown that the tax levy in San Diego county for 1886 was \$1.14 upon \$100, and that the sum paid to Riverside county for that year was the exact amount of the tax on 71.06 miles of road. In the same way it will appear that the payment of the reassessment for 1887 was also the tax on 71.03 miles. These errors in the complaint made it, to some extent, ambiguous, but they are not reached by a general demurrer.

6. It is contended on the authority of *Orange County v. Los Angeles*, 114 Cal. 390, that since the commissioners failed to make a division of the taxes for 1886 and 1887 in their report or award, no part of such taxes can be recovered by San Diego county. But all these taxes were properly payable to San Diego county in the first instance, and the portion received by Riverside county was so received only in consequence of a mistake made by the board of equalization and by the state treasurer. If, therefore, the failure of the commissioners to make a division renders a division impossible the case of Riverside county is so much the worse. The county of San Diego, instead of having about six-sevenths of the tax, should have had it all. If there is an error in the judgment it is not an error of which the appellant can complain.

The judgment is affirmed.

Temple, J., McFarland, J., Garoutte, J., and Harrison, J., concurred.

[S. F. No. 1164. Department Two.—July 29, 1899.]

EDWARD SALTZMAN, Appellant, v. SUNSET TELEPHONE AND TELEGRAPH COMPANY et al., Respondents.

NEW TRIAL—MISCONDUCT OF JURY—AFFIDAVITS—STATEMENT.—A motion for a new trial made solely on the ground of misconduct of the jury, must be made upon affidavits; and, in such case, a statement is unauthorized, and must be disregarded.

ID.—DEPOSITION TAKEN IN COURT.—The deposition of the deputy sheriff in charge of the jury, who refused to give a voluntary affidavit, must be regarded as an affidavit for the purposes of the motion.

ID.—RULING AS TO EVIDENCE—AFFIDAVIT OF DISSENTING JUROR—BILL OF EXCEPTIONS—REVIEW UPON APPEAL.—The ruling of the court in disregarding the affidavit of a dissenting juror as to the misconduct of a juror assenting to the verdict, need not be specifically excepted to or appealed from; but if all of the affidavits and the ruling upon the motion are incorporated in a bill of exceptions, the appellate court may review the competency of the affidavits upon appeal from the order denying a new trial.

- ID.—IMPEACHMENT OF VERDICT BY JURORS—REASONS FOR RULE—PUBLIC POLICY.**—The rule that the affidavits of jurors are not admissible to impeach the verdict, is proved by the statutory exception in case of a resort to chance. The rule is not based solely upon the estoppel of the assenting jurors, but is grounded upon public policy which forbids that the verdict should be imperiled by the evidence of jurors who may be tampered with to accuse themselves or other jurors, and which requires that the independence and freedom from improper restraint of the jury in their deliberations and discussions should be secured.
- ID.—APPLICABILITY OF RULE TO DISSENTING JURORS—DECLARATIONS OF ASSENTING JUROR.**—The rule against the affidavits of jurors is not changed in its application by the amendment of the Code of Civil Procedure which permits a verdict by a specified majority of the jury; and the affidavit of a dissenting juror is not admissible to prove the declaration of an assenting juror whose vote was essential to the verdict, to the effect that he would rather agree to the verdict than lose his pay.
- ID.—AFFIDAVIT OF JUROR TO SUSTAIN VERDICT.**—The affidavit of a juror is competent to sustain the verdict by explaining or denying alleged misconduct or interferences with the jury.
- ID.—SEPARATION OF JURY IN CIVIL CASE.**—The mere separation of a jury in a civil case is not ground for a new trial, except under the general ground of misconduct of the jury "materially affecting the substitute rights of a party."
- ID.—SEPARATION AGAINST INSTRUCTION—BURDEN OF PROOF.**—The separation of a juror from the jury against the instruction of the court, under such circumstances that improper influence might have been exerted upon him, puts upon him the burden of proving the contrary to sustain the verdict.
- ID.—USE OF TELEPHONE IN DININGROOM—REBUTTAL OF PRESUMPTION OF INJURY.**—Where it is shown by the affidavits of the juror and of the deputy sheriff that the juror, though improperly allowed to separate himself from the body of the jurors in a diningroom, merely stepped to a telephone therein to communicate briefly on private business, and that he had no other communication, the presumption of injury is rebutted.
- ID.—PERMISSION OF COURT—DUTY OF JUROR AND DEPUTY SHERIFF.**—It is improper for a juror to communicate by telephone without first obtaining the permission of the court to send a message, and the deputy sheriff in charge of the jury should be at the receiver.

APPEAL from a judgment of the Superior Court of Santa Clara County and from an order denying a new trial. A. S. Kittredge, Judge.

The facts are stated in the opinion of the court.

C. M. Jennings, Thomas V. Cator, and M. H. Kingore, for Appellant.

Van Ness & Redman, and E. S. Pillsbury, for the Sunset Telephone and Telegraph Company, Respondent.

Jackson Hatch, for the Receivers of the San Jose Railway Company, Respondents.

TEMPLE, J.—Action for damages for personal injuries received by plaintiff while in the employment of defendant.

Verdict was rendered for the defendant by a divided jury. The motion for a new trial was based upon the point of alleged misconduct of the jury. Such alleged misconduct was made to appear by the affidavits of the dissenting jurors, and upon one charge of misconduct by the affidavit of the deputy sheriff who had charge of the jury.

The notice of motion for a new trial stated that the motion would be made on a statement of the case and upon affidavits. The code provides that when the motion is made upon the ground of misconduct it shall be made on affidavits. (Code Civ. Proc., sec. 658.) The statement was, therefore, unauthorized. On the hearing the court refused to consider certain affidavits and denied the motion. Plaintiff then prepared a bill of exceptions, which was settled by the court, which included all the affidavits and the ruling. This was proper, and no injury was done by the statement. The record here seems sufficient if that be excluded. The deposition of the deputy sheriff, taken in open court, must be regarded as an affidavit. If he refused to make an affidavit, no other course was open to plaintiff, who should not be deprived of his testimony because of his unwillingness.

We are not called upon to review the action of the court in refusing to hear read the affidavits of the dissenting jurors which tended to impeach the verdict, except so far as it becomes necessary to determine the competency of such evidence in considering the final order of the court in denying a new trial. It was not necessary that the ruling in regard to the evidence should have been specifically excepted to, or appealed from. It is all involved and included in the appeal from the order refusing a new trial.

One matter of alleged misconduct consists of the charge made in the affidavit of a dissenting juror, that one of the

jurors who assented to the verdict stated, in substance, that he wanted his pay; that they would receive no pay unless they brought in a verdict, and he would agree to anything rather than not be paid. There were three dissenting jurors out of twelve, so that a change of one vote from the majority would have defeated the verdict. The trial court concluded that the verdict could not be impeached in this way. Whether it could be so impeached is the first question for discussion here.

Appellant admits that the general rule is that the affidavit of a juror cannot be used to impeach a verdict, but he contends that this rule is that the juror shall not be permitted to impeach his own verdict, and that the reason of this rule is that otherwise he may be induced by corrupt means to change his mind, or to swear falsely. It is also contended that he is estopped of record by his assent to the verdict, and should not be heard to the contrary. But it is contended that the rule has no application to dissenting jurors where a valid verdict may be rendered by the concurrence of three-fourths and since the new constitution of 1879 the rule must be understood to be that a juror shall not be permitted to impeach his own verdict, and does not apply to dissenting jurors. For nearly twenty years we have had a statute (Code Civ. Proc., sec. 657) to the effect that, if the assent of one or more of the jurors has been determined by a resort to chance, the misconduct may be proved by the affidavit of any one of the jurors. This is an exception to the general rule, and proves the rule, but in such case ten jurors might be unconnected with the matter, and an affidavit on their part would not indicate a change of mind or imply corruption. The so-called estoppel is simply that public policy requires that the sanctity and stability of judicial determinations shall not be subject to the evidence of jurors who may be tampered with, and who cannot, in general, testify without accusing themselves or some member of the jury. And this last consideration is, in my opinion, not the least cogent reason for the rule. The independence of the jury and the value of their discussions would be lessened if the reasons given by any juror for his opinions or for his verdict could be reported to the court and criticised, and his motives impugned for remarks made

in the jury-room. And such reports would be more likely to be made by dissenting jurors who had been heated by earnest debate and defeated by the final vote. But the independence of the jury would be gone if a perfectly correct report could be made and the verdict attacked by showing that some jurors mistook the evidence or the law, or were actuated by other considerations. There would be no freedom of discussion in the jury-room if they were subject to a possible censorship of this character. And the stability of judicial determinations would be as much imperiled by liability to attack by dissenting jurors as by the others. Nor is it true that the reason for the rule has always been stated to be that a juror may be induced to retract. Often an attack by the affidavit of a juror would not indicate a change of views or be an attack upon his individual verdict—if it could be so regarded. I have already shown this, but the instances may be greatly varied. He might testify that a fellow juror had his bottle in the jury-room, or got drunk, or offered a bribe to a fellow member, or stated facts not in evidence.

Were it not for the rule, a juror would be commended for disclosing these matters, and to do so would not be self-accusation, although it might furnish ground for attacking the verdict. The main reasons, I think, are these two: 1. That the jurors, who are practically the only witnesses in regard to the matter, may not be tampered with and verdicts by these means imperiled; and 2. To secure independence and freedom from improper restraint on the part of the jury.

In *Wilson v. Berryman*, 5 Cal. 45, 63 Am. Dec. 78, the reason for the rule is given that independence of opinion would be thus secured.

In *Hannum v. Belchertown*, 19 Pick. 311, it was said: "The secrecy of the deliberations and discussions of the jury, and the exemption of jurors from the liability of being questioned as to their motives and grounds of action, are highly important to the freedom and independence of their decisions." In *Woodward v. Leavitt*, 107 Mass. 453, the court says: "It is essential to the freedom and independence of their deliberations that their discussions in the jury-room should be kept secret and inviolable, and to admit the testimony of jurors to what took place there would create embar-

rassment and uncertainty." The learned judge cites a great many cases, English and American, in support of his views, among them *Cook v. Castner*, 9 Cush. 266, where Shaw, C. J., said: "All communications among jurors are confidential; they are intended to be secret, and it is best they should remain so." To the same effect in *Heffron v. Gallupe*, 55 Me. 563. Also *State v. Freeman*, 5 Conn. 348, where Judge Hosmer says: "On a principle of policy to give stability to the verdicts of jurors and preserve the purity of trials by jury, the evidence ought not to be admitted." (See, also, Jones on Evidence, sec. 784, and Thompson and Merriam on Juries, 440.)

These authorities all show that the reason given for the rule is not solely because jurors may be induced to repent of their verdicts. No doubt, also, courts more willingly and strictly enforce the rule because, if the verdict is wrong, it may be attacked and reviewed upon that ground without reference to the misconduct of the jury. I think the rule is not changed in its application by the amendment which permits a verdict by the specified majority of the jury.

The question still remains to be considered, whether the communication by the juror Krumb over the telephone with some person outside was such misconduct as should induce the court to vacate the verdict. This fact is shown by the affidavit of the deputy sheriff who had charge of the jury. It is to be considered solely in connection with the facts found in this affidavit, and without knowledge of how Krumb had previously voted.

The deputy, in violation of his sworn duty, permitted Krumb, while the jury were dining at a restaurant, to which he had taken them in obedience to an order of the court, to leave the table and go to a telephone receiver, which was apparently in the same room, and call some one, no doubt at the central office, which was in charge of the defendant in the case. The deputy went to the receiver with him. He heard him ask through the telephone for his father-in-law, and tell some one to have his father-in-law call him, as he would probably stay out all night—that he was then at the restaurant. He was afterward called up and again went to the telephone, the deputy going with him. He heard Krumb tell his father-in-law that he would probably be kept out all night, and ask him to take care of his horse. Krumb said

nothing about the case, and though the deputy was produced for examination by the appellant nothing was shown which was calculated to raise a suspicion that any communication was had with anyone about the case. With the deputy standing by his side, while giving this very short and simple message, it could easily be told whether there was further conversation.

The affidavit of Krumb was also read in explanation. He says he called one Hobson to go for his father-in-law, and also to a clerk in his own store, and asked him to close up at the usual time, and that he was called up by his father-in-law, and asked him to take care of his horse and chickens, to which his father-in-law assented. He had no further communication with anyone, and nothing was said about the case at all. It is agreed that, while the affidavit of a juror cannot be used to impeach a verdict, it is perfectly competent to explain or to deny alleged misconduct or interferences with the jury.

It is contended that the conduct of Krumb was a separation from the jury under such circumstances, that improper communications could have been made to him, and in the nature of things there can be no conclusive evidence upon the matter save his own. Communications through a telephone, it is said, are especially dangerous. A telephone in a juryroom takes the ear of the juror abroad secretly for any corrupt proposition a party may desire to send.

Appellant contends that the affidavit of a juror cannot be used to show that he has not been corruptly approached where he has improperly separated himself from the jury under such circumstances, that an attempt to corrupt might be made. As authority he cites *People v. Backus*, 5 Cal. 275; *People v. Thornton*, 74 Cal. 484, and *People v. Stokes*, 103 Cal. 193; 42 Am. St. Rep. 102. In criminal cases, our statutes have always provided, as now by section 1181 of the Penal Code, that a court may grant a new trial "when the jury has separated without leave of the court, after retiring to deliberate upon their verdict." There is no such ground for granting a new trial in a civil case, except under the ground of misconduct of the jury "materially affecting the substan-

tial rights of a party." The force of the decision in *People v. Backus*, *supra*, has been somewhat weakened by *People v. Bonney*, 19 Cal. 427; *People v. Symonds*, 22 Cal. 349, and *People v. Brannigan*, 21 Cal. 338.

The matter is fully discussed in a note to *McKenny v. People*, 43 Am. Dec. 65. The annotator says it is almost the universal rule that in order to set aside the verdict "there must be some evidence of other misconduct, in addition to the mere fact of separation, which has operated to the party's prejudice."

The rule in this state, I take it to be, in civil cases, that a separation, against the instruction of the court, with evidence that improper influence might have been brought to bear upon the juror, puts the burden upon the party seeking to sustain the verdict to negative the presumption and show that no such attempt was made. I think that was done in this case. The brevity of the communication, the presence of the deputy who could hear what was said by the juror, and the affidavit of the juror, rebut the presumption of injury.

Still I am impressed with the argument as to the particular impropriety of allowing a juror to communicate by telephone. Both the juror and the deputy were guilty of gross impropriety. The juror should have obtained permission from the court to send a message and the deputy should have been at the receiver.

The judgment and order are affirmed.

McFarland, J., and Henshaw, J., concurred.

[No. 15551. Department One.—July 29, 1899.]

JOHN D. FRENCH, Respondent, v. JAMES P. McCARTHY, Appellant, and BEHREND JOOST, Codefendant.

VENDOR AND PURCHASER—CONTRACT OF SALE—INTEREST IN PROFITS OF RESALE—PURCHASE OF VENDEE'S INTEREST—CONSIDERATION.—Under a purchase by the vendor and a third person of the interest of the vendee in a contract for the sale of land, upon which five thousand dollars had been paid by the vendee and which provided for an interest in the profits of the resale of the land by the vendor, out of which the remainder of the purchase money was to be paid, for which interest of the vendee, the purchasers

paid five thousand dollars, subject to reimbursement out of the profits of the original five thousand dollars paid by the vendee, an agreement by the purchasers that whatever part of such original payment should not be repaid to the vendee out of the profits by a fixed date, should be paid by the purchasers to him, constitutes part of the consideration for the purchase of the contract, and is not an agreement for a penalty or liquidated damages.

ID.—ACTION UPON CONTRACT—AMENDMENT OF COMPLAINT.—In an action upon the contract to make good the unpaid portion of the original five thousand dollars of purchase money paid by the vendor, where the terms of the contract are set forth in the complaint, and issue has been joined by answer, the court may permit an amendment of the complaint to correct an inconsistency between the prayer of the complaint and the facts stated therein.

ID.—FAILURE TO MAKE AMENDMENT ALLOWED—CORRECTION OF RECORD.—The failure to make the amendment allowed formally upon the record, does not necessitate a reversal of the judgment, but the record will be ordered to be corrected to conform with the order permitting the amendment.

ID.—AGREEMENT TO SUBSTITUTE STOCK FOR LAND—PAYMENT—PLEDGE—FINDING AS TO VALUE IMMATERIAL.—Where there was a supplemental agreement that the land should be conveyed to a corporation, and that the stock should take the place of the land, under an allegation in the answer that plaintiff had accepted stock in payment of his obligations under the agreement and under the claim of plaintiff that the stock was received by way of pledge or collateral security for the contract sued upon, there is no issue authorizing a finding as to the value of the stock.

ID.—TENDER OF PLEDGED STOCK—RETENTION UNTIL SATISFACTION OF JUDGMENT.—In an action upon a contract to pay a sum of money, stock held by way of pledge or collateral security for the obligation, need not be tendered by the plaintiff, but may be retained by him until satisfaction of the judgment in his favor; and it is not necessary that the judgment shall provide that the stock shall be surrendered, upon such satisfaction.

ID.—JOINT OBLIGATION—RELEASE OF CODEFENDANT.—The release of a codefendant who was a joint obligor with the other defendant does not release the other defendant from his obligation to pay so much of the debt as was not paid by the codefendant released.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. D. J. Murphy, Judge.

Edgar D. Peixotto, and O'Byrne & Peixotto, for Appellant.
Chickering, Thomas & Gregory, for Respondent.

HARRISON, J.—The parties to this appeal entered into a contract December 23, 1890, by which the respondent agreed to purchase from the appellant an undivided twentieth of a tract of land in San Francisco for the sum of twenty thousand dollars, of which he paid five thousand dollars to the appellant. The appellant was to retain the title to the land and make sales thereof, and the other three-fourths of the purchase price was to be paid out of the proceeds of these sales. On the 30th of December the defendants herein—the appellant and one Joost—made a contract with the respondent, by which, after reciting the aforesaid agreement and that they “are desirous of obtaining an interest in said contract and the benefits to accrue therefrom,” they agreed with him that if he should not, within one year from January 10, 1891, receive back the money paid by him under said contract, they would pay or cause to be paid to him all sums of money that he had already paid, together with the sum of five thousand dollars in addition thereto. In consideration thereof the plaintiff agreed that the defendants should be entitled to receive all moneys to which he might be entitled by virtue of said contract of December 23d, above the sum of five thousand dollars that he had already paid.

It may be inferred from the record, although there is no direct evidence of that fact, that the land involved in the agreement was conveyed to the Sunnyside Land Company, and on or about January 27, 1891, the respondent, being about to convey his interest in the contract of December 23d to that company, at the request of the defendants, and to receive certain shares of stock in lieu of the contract, or of his interest in the land, the parties to the agreement of December 30th made a supplemental agreement providing that the said transfer should not affect their obligations thereunder, but that the stock should take the place of the contract, and thereupon a hundred shares of the capital stock of the company was issued to the plaintiff. The plaintiff, not having received back any of the money that he had paid under the contract of December 23d, brought the present action March

17, 1892, upon the contract of December 30th, to recover from the defendant the amount therein agreed by them to be paid. The appellant in his answer thereto alleged that he had fulfilled all the obligations and conditions of the contract of December 23d to be performed by him, and that the plaintiff had received the above-named one hundred shares of capital stock for the amount paid by him thereunder, and had accepted said stock in "payment" of all obligations on the part of the defendants, or by virtue of the agreement of December 30th. After the action had been commenced, the plaintiff, under an agreement made by him with Joost, received the sum of four thousand five hundred dollars, and released him from the obligations of the agreement of December 30th, but provided in the release that it should not operate or be construed to release or in any way discharge the appellant. At the trial of the cause the court, upon the request of the plaintiff, granted him leave to amend his complaint by inserting therein the sum of ten thousand dollars, in the place of five thousand dollars, in the prayer for relief. The trial proceeded without any formal amendment having been made, and at its close the court rendered judgment in favor of the plaintiff and against the appellant for the sum of five thousand five hundred dollars.

The instrument of December 30th was an agreement on the part of the defendants to purchase from the plaintiff his interest in the contract of December 23d, by which they agreed to pay him the sum of five thousand dollars, and also whatever portion of the five thousand dollars which he had paid to the appellant should not be received back by him prior to January 10, 1892. It was evidently in the contemplation of the parties to each of the contracts that large profits were to be received from the sales of the lands described therein, and the defendants agreed to make this payment to the plaintiff in consideration of his agreement therein that they should be entitled to all of these profits. The provision in the agreement for the payment of five thousand dollars in addition to the amount paid by the plaintiff was in no respect a penalty or liquidated damages. No breach of obligation, or damage sustained thereby, was contemplated or provided for, but the entire transaction was an original contract for the

purchase of the plaintiff's interest in the agreement of December 23d, for which he was to receive ten thousand dollars—five thousand dollars from the defendants in any event, and in addition thereto such portion of the five thousand dollars which he had already paid as should not be returned to him under the terms of his original purchase.

The court did not err in permitting the amendment to the complaint. The action is upon a contract and its terms are set forth in the complaint. The appellant had appeared and answered, and, if there was any inconsistency or want of conformity between the prayer of the complaint and the facts set forth therein, the court was authorized to permit the amendment. The failure to make it formally upon the record does not necessitate a reversal of the judgment. The record can still be corrected to conform with the order permitting the amendment. (*Alameda County v. Crocker*, 125 Cal. 101.)

There was no issue before the court which authorized an inquiry into the value of the stock of the Sunnyside Land Company. Under the allegation of the appellant that the plaintiff had accepted this stock in "payment" of his obligations under the agreement of December 30th, such inquiry was immaterial. The finding of the court against this defense left the plaintiff's relation to the stock to be determined according to the terms under which he received it. The agreement of January, 1891, that the stock should take the place of the contract of December 23d, was equivalent to an agreement by the defendants to purchase the plaintiff's right to the stock that the Sunnyside Land Company might issue. The record does not show when or under what conditions the plaintiff received the stock; but if, as claimed by the appellant, it is held by the plaintiff as collateral security for the agreement of December 30th, he is entitled to maintain the action without any tender of the stock, and may retain the stock until the judgment in his favor is satisfied (*Sonoma Valley Bank v. Hill*, 59 Cal. 107); nor is it necessary that the judgment should contain a provision that the stock should be surrendered upon such satisfaction. (See *Allin v. Williams*, 97 Cal. 403.)

The release of Joost did not have the effect to release the defendant from the same obligation. (Civ. Code, sec. 1543; *Northern Ins. Co. v. Potter*, 63 Cal. 157.)

The judgment and order are affirmed, with directions to the superior court to cause the complaint to be amended in accordance with its order made at the trial, and as of the date when said order was made.

Garoutte, J., and Van Dyke, J., concurred.

[L. A. No. 456. Department One.—July 31, 1899.]

J. M. ASHER, Administrator, etc., Respondent, v. VICENTE YORBA et al., Respondents. MARY A. FLINN, Appellant.

GUARDIAN AND WARD—APPOINTMENT OF GUARDIAN—NOTICE TO RELATIVES—POSTING—DISCRETION OF COURT.—Upon the appointment of the guardian of the estate of a minor, the court has discretion to determine the kind and character of the notice to be given to the relatives of the minor residing in the county, and may order such notice to be given by posting, without requiring personal service of citation upon them.

ID.—CUSTODY OF MINOR—NOTICE TO GUARDIAN.—If the one who applies to be appointed guardian of the minor's estate has the custody of the person of the minor, no notice is required to be given to him.

ID.—SUFFICIENCY OF POSTING—COLLATERAL ATTACK—SALE OF WARD'S ESTATE.—The fact that the affidavit of the posting of the notices required to be given of the hearing for the appointment of a guardian did not show when the notices were posted, in the absence of proof that the posting was not performed as required, will not sustain a collateral attack upon a judgment decreeing a sale of the ward's estate.

ID.—PRESUMPTIONS—JURISDICTIONAL FACTS—BURDEN OF PROOF.—The posting of the notice is presumed to have been done at the proper time and in the proper manner; and the order of sale is presumed to be valid. The absence of evidence of the jurisdictional facts may be taken as evidence of their existence; and the burden of proof is upon the one assailing their existence, to show the contrary.

ESTATES OF DECEASED PERSONS—DISTRIBUTION—NOTICE OF HEARING—JURISDICTION.—The statute does not require ten days' notice of the hearing of the final account and petition of an administrator for the distribution of the estate, but allows the court to direct what notice shall be given. Where the hearing was fixed at such a date

that a ten days' posting was impossible, and the notice was posted every day prior to the hearing, the court had jurisdiction, at the date fixed, to settle the account and render the decree of distribution.

APPEAL from an interlocutory decree of the Superior Court of Orange County. J. W. Ballard, Judge.

The facts are stated in the opinion of the court.

Withington & Carter, for Appellant.

McKelvey & Bowes, Charles S. McKelvey, and O. A. Trippett, for Plaintiff Respondent.

R. Y. Williams, for Vicente Yorba and Frederico Botiller, Defendants Respondents.

GAROUTTE, J.—This appeal is by Mary A. Flinn from an interlocutory decree in partition. She claims as the successor in interest of Felipe Ames. To support her claim she insists: 1. That a certain sale of real estate by the guardian of Felipe Ames, minor, was void; and, 2. That a decree of distribution rendered in the administration of the estate of the mother of Felipe Ames was also void.

It is insisted that the guardian of Felipe Ames was appointed without any notice as required by statute, and therefore his appointment was void, and his acts in making the sale were also void for that reason. The statute as to the appointment of guardians, among other matters, provides: "Before making such appointment the court must cause such notice as such court deems reasonable to be given to any person having the care of said minor, and to such relatives of the minor residing in the county as the court may deem proper." Upon the filing of the petition for the appointment of a guardian the judge made an order that he deemed a ten days' notice by posting in three public places in the county would be a reasonable notice. Thereafter the clerk, as appears by his affidavit attached to a copy of the notice, posted a notice of the hearing for December 18th, in three public places in the county (naming the places). The notice is dated December 8th, and the affidavit fails to state the particular day when the notice was posted.

It is claimed that under the section of law quoted, notice

of the hearing must be personally served by citation upon the relatives of the minor residing in the county. We fail to see that the statute makes such a demand. The statute does demand that the relatives living in the county, if the court deem proper, must be given such notice as the court deems reasonable. If the court deems a notice for ten days, by posting in three public places, a reasonable notice to them, it would seem within the power of the court to so declare. The statute clearly implies that the kind or character of the notice to be given is a matter for the judge to determine, and that a personal notice is not absolutely demanded by the provision quoted. *Burroughs v. De Couts*, 70 Cal. 373, was decided at a time when the statute as to notice was similar to that now found on the statute books. In that case it is said: "The manner in which the notice shall be given to the relatives of the minor residing in the county is left to the judgment and reasonable discretion of the probate judge." (Citing *Gronfier v. Puymiol*, 19 Cal. 629.) In the case cited it was decided that a publication in a newspaper for five days was a sufficient notice under a statute allowing the judge to fix the manner of the notice.

Aside from these facts, upon a careful reading of the statute, it will be found that it is a matter of discretion upon the part of the court to give any notice whatever to the relatives residing in the county. The statute says the notice is to be given to those relatives of the minor residing in the county, "as the court may deem proper." It will be borne in mind that in this case the father had the custody of the child and asked to be appointed guardian of her estate. Necessarily a notice to him was not required. (*Smith v. Biscailuz*, 83 Cal. 353.)

Many technical objections are made to the validity of the appointment of the guardian; as, for example, that the affidavit of posting does not show when the notices of the hearing were posted. It must be borne in mind that this appellant is here making a collateral attack upon a judgment decreeing a sale of the minor's land, and, consequently, all the rules of law hedging about the validity of such decrees are to be invoked against her. The order of sale in this case is presumed to have been a valid one. It behooves her to

show to the contrary. The burden is upon her to show a void sale. The absence of evidence in this record showing the jurisdictional facts may be taken as evidence against her. If the posting of these notices was not performed according to the requirements of the statute, it was for her to show that fact. If the evidence does not show how it was done, and when it was done, it will be presumed that it was done in the proper manner and at the proper time. Of course, we are not even intimating that appellant would be allowed to go outside of the record of the proceedings and by extrinsic evidence attack the validity of the guardian's sale.

It is claimed that the decree of distribution in the estate of Christina Ames, deceased, mother of Felipe Ames, predecessor in interest of this appellant, is void by reason of a want of notice of the hearing at the time the decree was made. Upon January 2, 1890, the final account and petition for distribution in the estate were filed, and the court fixed the eleventh day of January as the time for hearing the account and petition, and ordered ten days' notice of the hearing to be given by posting. Section 1634 of the Code of Civil Procedure provides that "notice of the hearing must be given by posting or publication, as the court may direct, and for such time as may be ordered." Here it was impossible to post the notice of the hearing for ten days, for only nine days intervened prior to the date set for the hearing. But in view of the fact that the statute does not require ten days' notice, and that it rests solely with the court to fix the day for hearing and the time of notice to be given, we see nothing here which renders the decree of distribution void. The date set for the hearing must control when an inconsistency is presented such as we see before us; and, if this notice were posted for every day prior to the time of hearing there was no lack of jurisdiction in the court to make the decree.

For the foregoing reasons the judgment is affirmed.

Harrison, J., and Van Dyke, J., concurred.

Hearing in Bank denied.

Beatty, C. J., dissented from the order denying a hearing in Bank.

[Sac. No. 555. Department One.—July 27, 1899.]

H. D. WRIGHT et al., Appellants, v. LAFAYETTE EAST-
LICK et al., Respondents.

NEW TRIAL—MISCONDUCT OF JURY—CONVERSATION, DRINKING AND CAROUSAL WITH PARTIES.—The misconduct of jurors whose concurrence was essential to the verdict, in conversing about the case with parties to the action, and in drinking and carousing with one of the prevailing parties, is such misconduct as entitles the losing parties to a new trial, irrespective of counter-affidavits that the treating of and drinking with the jurors was indulged in by both parties to the litigation, and that their verdict was uninfluenced by the misconduct complained of.

APPEAL from a judgment of the Superior Court of Siskiyou County. J. S. Beard, Judge.

The facts are stated in the opinion of the court.

James F. Farragher, and J. H. Magoffey, for Appellants.

Gillis & Tapscott, George D. Butler, and I. A. Reynolds, for Respondents.

VAN DYKE, J.—This action involves a contest regarding a line dividing mining claims in Siskiyou county. The trial was by jury, and the verdict and judgment for the defendants. The appeal is from the judgment and from an order refusing the plaintiffs' motion for a new trial. Among the grounds of the motion for a new trial is the alleged misconduct of the jury. And this is pressed on the appeal. The misconduct complained of relates principally to the jurors John Neville and John B. Lowden, the former of whom was elected and acted as foreman. The affidavits produced in support of the motion for a new trial show that during the progress of the trial Neville approached the plaintiff, H. D. Wright, and stated to him, that he, Neville, "was going to do the right thing; that he was pretty well satisfied who the right one was, and that he was a pretty good talker, and could make the jury see things in the right light." This occurred just prior to the departure of Neville from Yreka to Montague. On arriving at Montague he told James M. Davidson,

a witness in the case, and John T. Bradley, that plaintiff Wright had, during the trial of the case, approached him and commenced to talk with him about the said cause, and that he had told said Wright to stop talking to him about the case, and that if he did not that he would report him to the court. Said Neville also stated to Charles J. Fry during the progress of the trial that appellant Wright had attempted to talk to him about the trial for the purpose of influencing him in his verdict. The affidavit of Wright contradicts point blank this statement of the juror Neville; and, on the other hand, it is stated in Wright's affidavit that Neville attempted to approach him and talk about the case, and in his denials and affirmative statements Wright is corroborated; and Neville, in his counter-affidavit, does not attempt to controvert or impeach Wright's affidavit.

It is further shown by the affidavits of several parties that pending the trial, and on New Year's eve, Neville attended a dance at Hawkinsville, some two and one-half miles from Yreka, in company with W. W. Eastlick, one of the defendants. They went together in the same conveyance to the dance, and returned in like manner to Yreka. During the night of the dance at Hawkinsville they drank and got drunk together; were "partners," and frequently walked alone from the dancehall to the saloon and appeared to be quite intimate. Just prior to attending this dance Neville stated to one of his cojurors, Elliott R. Taylor, that he, Neville, was broke. On the day after John Lowden, who, it appears, had been an intimate associate of Neville during the progress of the trial, stated to juror Taylor that Neville had made "a killing of ninety-seven dollars." And Neville, on his return from the dance, stated to juror Taylor that he "blowed in a deal of money."

Shortly after the discharge of the jury, Neville approaching defendant Wallace Eastlick, with whom he went to the Hawkinsville dance, said: "Well, old man, I brought in a verdict for you all right." And juryman Lowden was seen talking to the defendant Lafayette Eastlick, in a secreted place in the rear of a saloon. Lowden and Neville went buggy-riding during the trial and one Whipple, a nephew of defendants Eastlick, held the team while they took a drink;

and they also drank with the defendants Eastlick, and visited their brother together while they were both drunk.

The counter-affidavits go to show that juror Neville, aside from his intemperate habits, was considered a good man and citizen, and that the treating and drinking was not all on one side, but was indulged in by both parties to the litigation. The conduct of these two jurors, principally foreman Neville, visiting saloons and going to dancehouses, and drinking and carousing with parties to the action, is not controverted by respondents' counsel, but they seek to extenuate the same. They say: "The parties, the witnesses, and some of the jurors were miners; they were away from home; and the trial lasted over the holidays; and, while these things were not to be encouraged, still all that is shown in this case is the following out of the very general custom throughout the mining districts, and we think no one who is at all familiar with the custom of miners in this state will say that because one or two jurors happened to be present and joined when the crowd was invited up to take a social drink during the holidays that the verdict was tainted thereby." It is scarcely to be credited that such misconduct on the part of the jurors, as the record in this case discloses, is but following out the custom, either general or local, throughout the mining district of this state. If there were such a custom, surely it "would be more honored in the breach than the observance." It is to be presumed that when jurymen are selected and sworn to try a cause, either in the mining or other districts in this state, they realize the obligation of their oath, and their duty as good citizens toward the community, and act accordingly. In the early '60's a district judge in this state, whose district embraced mining counties, was impeached on the ground, among others, that during the trial of a cause he left the bench and visited a saloon and there drank and caroused with witnesses and the parties, or one of the parties. If a judge may not do these things, why should the jury, or member of the jury, be allowed to do so? By the constitution trial by jury is secured to all, and the judge is prohibited from charging the jury with respect to matters of fact; and by the law of the state the jury "are the judges of the effect and weight of evidence." (Code Civ. Proc., sec. 2061.) The jury, there-

fore, while engaged in the trial of a cause, forms a very important part of the tribunal. A wrong verdict, resulting from prejudice or misconduct of the jury, or members thereof, is more detrimental to a party litigant than an error of law committed by the trial judge; an error at law can readily be corrected on appeal, whereas if the testimony appears to be substantially conflicting the verdict must be allowed to stand, although resulting from secret or undiscovered prejudice or misconduct.

It goes for nothing that the jurymen in this case say that their verdict was uninfluenced by the misconduct complained of. As said in *People v. Stokes*, 103 Cal. 196, 42 Am. St. Rep. 102: "A juror is not allowed to say: 'I acknowledge to grave misconduct; I received evidence without the presence of the court, but those matters had no influence upon my mind when casting my vote in the jury-room.' The law, in its wisdom, does not allow a juror to purge himself in that way." (See, also, *People v. Azoff*, 105 Cal. 632; *Woodward v. Leavitt*, 107 Mass. 466; 9 Am. Rep. 49.) The verdict in this case was by the bare constitutional number required of nine to three, and the result might have been different if it had not been for the misconduct complained of. However, as said in *Palmer v. Railway Co.*, 2 Idaho, 290: "It is not necessary for us to find that this conduct had any effect upon the verdict in order to sustain this motion for a new trial. It is enough to say that it is calculated to do so." Again, it is said in *McDaniels v. McDaniels*, 40 Vt. 374, 94 Am. Dec. 408: "There is no practical method to so analyze the mental operations of the jurors as to determine whether, in point of fact, the verdict would have been the same if the trial had been conducted as both parties had the right to expect, according to law and upon the evidence in court. The court should set aside the verdict in justice to itself as well as to the parties, that the trial may be conducted fairly, so that the verdict, when rendered, may be entitled to the respect of both parties and the confidence of the court." Thompson on Trials, section 2564, states the rule as follows: "Where the jury has been treated, fed, or entertained by the successful party or his counsel, or at the expense of either, a new trial will, in nearly all cases, be granted. This rule is, by most

courts, deemed indispensably necessary to preserve the integrity of juries; it being, as already stated, a rule of public policy, it will be enforced without reference to the question whether or not the verdict was right."

We cannot be too strict in guarding trials by jury from improper influence. This strictness is necessary to give due confidence to parties in the results of their causes; and everyone ought to know that for any, even the least, intermeddling with jurors a verdict will be set aside. (*Knight v. Freeport*, 13 Mass. 218.)

On the showing made in this cause the court below should have granted a new trial. The conclusion we have arrived at renders it unnecessary to consider the other points made by the appellants.

Judgment and order denying a new trial reversed.

Harrison, J., and Garoutte, J., concurred.

Hearing in Bank denied.

[Crim. No. 511. Department One.—August 1, 1899.]

THE PEOPLE, Respondent v. ANDREAS CASTRO, Appellant.

CRIMINAL LAW—EVIDENCE—CONFESSIONS OF DEFENDANT—INDUCEMENT—BURDEN OF PROOF.—The burden is on the prosecution to show that confessions of a defendant charged with crime were made voluntarily and without previous inducement; and where it appears that the defendant at first denied his guilt, and afterward confessed to the sheriff under improper representations and inducements held out to him, it must be shown that confessions made to the deputy sheriff and to the jailor were not only without inducements held out by them, but also that they were not induced by those held out to him by the sheriff in order to justify their admissibility.

ID.—SUFFICIENCY OF OBJECTIONS TO EVIDENCE—MOTION TO STRIKE OUT.—Where the court refused to permit the defendant to show that confessions offered in evidence were made under promises of exemption from a heavy penalty, and overruled his objection that the state must show more than that no inducements were held out at a particular conversation, such rulings and exceptions were sufficient, without

repetition, to cover all confessions thereafter offered, and to justify a motion to strike out all evidence of confessions to various persons not shown to have been induced by representations which were proven to have been held out by the sheriff.

APPEAL from a judgment of the Superior Court of Santa Barbara County. W. S. Day, Judge.

The facts are stated in the opinion.

W. G. Griffith, and C. F. Carrier, for Appellant.

Tirey L. Ford, Attorney General, and A. A. Moore, Jr., Deputy Attorney General, for Respondent.

HAYNES, C.—Appellant was tried upon an information charging him with having stolen a cow, was found guilty, and sentenced to imprisonment in the state's prison for the term of ten years.

Mr. Rice, the owner of the cow, testified that it was in the pasture on the 25th of February, 1898, and on the 26th he found it in the slaughter-pen of Metcalf & Gehl, and that it was taken from the pasture and placed in the pen without his permission.

Mr. Baker testified that on the morning of the 26th he went to the pasture and found that the fence had been taken down, his cow taken out and the fence put up again, and saw the tracks of three cows and two horses which he followed to said slaughter-pen, and there found three cows, one of which was his and one Mr. Rice's.

At this stage of the evidence the prosecution called Thomas B. Hicks, who testified that he was the jailer of the county jail, that he had known the defendant two years, and saw him at the jail on February 26th. He was then asked: "Did you hear him make any statement in regard to his guilt or innocence in this matter?" The defendant objected to the question, "and asked leave to introduce testimony to show that the admissions sought to be elicited were made by the defendant under promises of exemption, and that a lesser penalty would be imposed if he pleaded guilty, and that the case was a foregone one against him."

The court denied the motion, and the defendant excepted. The witness testified that the conversation was had in the district attorney's office a short time after the defendant's arrest. "There were two conversations at which I was present. There were four of us present the second time, Andreas Castro, Ed. Burke, and myself and my father. When you (the district attorney) took him to your office you simply asked him whether he did or not, and you never told him that you would help him, or you never made any threat to him; you asked him two or three times if he did the deed, and he set back in his chair and kind of studied. There were not any inducements held out to him to answer. Q. Now, what did he say at that time?" The defendant objected to the question upon the ground that there was no sufficient basis for proving a confession; that he was imprisoned and under duress, and that the state must do something more than show that at this particular conversation no inducements were held out to him. This objection was overruled, and the defendant excepted. The witness then testified: "Mr. Storke then asked him if he knew anything about this cattle-stealing, and he hung back. No, he didn't know; and finally he began to get uneasy in his chair, and finally says, 'Yes, I do; my brother and I took the cows and drove them to the slaughterhouse.' "

Upon cross-examination, the witness testified that there was a conversation with the defendant at the jail at which the witness' father (the sheriff), Mr. Burke, and himself were present; that he couldn't say positively whether it was within a day or two after his arrest.

Mr. Shoup, the deputy sheriff who made the arrest, but who was not present at either of the conversations above narrated, testified that on the day of the arrest the defendant denied the charge; that afterward he had another conversation with defendant, but did not fix the date either in relation to the arrest or to the other conversations above referred to, further than that it was a few days after he put him in jail, and was "at the bars of the jail." The witness said: "He commenced talking to me about the matter, and admitted that he and his brother Frank took the cows, but said he made his brother take them, made his brother go with him. He said he took three cows out of Scull's pasture and put them

in Metcalf's slaughter-pen"; and that no threats or inducements were made at any time so far as he knew.

Mr. Burke, one of the persons present at the conversation in the district attorney's office, and who acted as interpreter on that occasion, was called by the prosecution, and testified that no inducements or threats were used or any influence exerted to induce the defendant to make any confession. Upon cross-examination he testified as follows: "This was not the first time that I acted as interpreter with the defendant, but it was the first and only time with the district attorney. Before that I had acted as interpreter for Sheriff Hicks while he talked with him in the office of the jail. The sheriff and Tom Hicks, the jailer, were there; Mr. Hicks, the sheriff, started in by informing the defendant that he had a bad case against him—had a sure case against him—and it would be best for him to make a clean breast of the whole affair and relate all the circumstances in regard to it. Of course, the defendant argued about the matter to some extent. At first, he stoutly denied having anything to do with it, and then asked the sheriff to promise him to help him out of the scrape, do all he could for him, if he should make a full confession in regard to it. The sheriff assured him that he would do everything in his power to help him. And, in fact, the prisoner went to such an extent as to make the sheriff shake hands with him, as pledge of good faith. The promise that the sheriff made to him, though, was in this way: He said, 'I may be able to induce the court or jury to give you a light sentence—go as easy as possible with you'; that was the substance of it. Of course, some months have elapsed and I do not remember very well. The defendant made no admission of guilt until after receiving these assurances. The defendant's knowledge of English is very slight."

Counsel for defendant then moved "to strike out the evidence that has been introduced of this statement made by the defendant, the evidence of T. B. Hicks and E. M. Burke, on the ground that the statement made by the defendant, as testified to by those witnesses, was involuntary and induced by hopes of reward." The court ruled that the testimony of the confession made in the district attorney's office be ex-

cluded, and added: "If there is any other it remains in."

"Mr. Storke: What becomes of the Shoup testimony. The Court: Well, this motion does not extend to that; that remains. Mr. Griffiths: We covered all the evidence as to confessions, I think. The Court: I did not so understand it. If it does extend to that, the only testimony that will be excluded is that of the conversation in the district attorney's office, the other remains. If your motion extends to that portion of it, it is denied. Mr. Carrier: We except to the ruling of the court in so far as it refers to the Hicks testimony and the Shoup testimony."

We have given a very full statement from the record, in view of respondent's contention that proper objections were not seasonably made, and exceptions taken. This contention cannot be sustained. Conceding that defendant's request to be permitted to show that the alleged confessions were secured through promises of influence in his behalf was somewhat premature, it does not appear that it was denied upon that ground, and counsel doubtless understood the ruling as a denial of his right to make such showing; but be that as it may, when the witness, who was then testifying as to what was said at the district attorney's office, was asked the question, "Now, what did he say at that time?" the defendant objected, and among the grounds of objection stated "that the state must do something more than show that at this particular conversation no inducements were held out to him." That objection was overruled, and an exception taken. These two objections and exceptions were sufficiently specific to advise the court and the district attorney of the points made by the defendant, and it was not necessary that they should be repeated upon the examination of subsequent witnesses in order to justify his motion, afterward made, to strike out the testimony of said confessions. The colloquy between the court and counsel after the ruling upon the motion to strike out said testimony shows that counsel for defendant intended their motion to cover all the testimony as to defendant's confessions, and after the court had been so informed the ruling was repeated with the statement by the court that if the motion extended to other confessions than that made in the district attorney's office it is denied as to

such other confessions, and that ruling was excepted to. I think it does not sufficiently appear that the confession made to Shoup was not induced by prior representations and inducements made by the sheriff to justify the ruling of the court. The time at which these statements were made does not appear, but it does appear from the testimony of Mr. Burke that at the conversation held by the sheriff, the jailer Hicks, and the witness with the defendant, prior to the interview at the district attorney's office, that at first the defendant "stoutly denied having anything to do with it"; and it is not reasonable to suppose that prior to that time he had voluntarily and without solicitation or inducement admitted to another officer that he was guilty. The burden being upon the prosecution to show that the confession was made voluntarily and without inducement on the part of the officer, the condition imposed by the law as to its reception was not complied with, and it should have been stricken out.

The testimony of Mr. Hicks was as to the confession made in the office of the district attorney, and was therefore excluded; but the ruling left with the jury evidence that a confession of guilt was made to the sheriff, the jailer, and Mr. Burke in the sheriff's office prior to the confession made in the district attorney's office, though the latter confession was excluded because the former was obtained by improper representations, as clearly appears from the testimony of Mr. Burke.

Appellant discusses some instructions requested by the defendant to be given to the jury, but in view of what has been said they need not be specially noticed.

I advise that the judgment be reversed and the cause remanded.

Gray, C., and Chipman, C., concurred.

For the reasons given in the foregoing opinion the judgment is reversed and the cause remanded.

Garoutte, J., Van Dyke, J., Harrison, J.

[S. F. No. 1816. In Bank.—August 4, 1899.]

FRED H. DAY, Petitioner, v. S. O. GUNNING, Respondent.

ELECTION CONTEST—APPEAL FROM JUDGMENT—STAY OF PROCEEDINGS—

MANDAMUS.—Upon appeal from a judgment rendered in favor of the contestant in an election contest, the giving of the three hundred dollar bond operates as a stay of proceedings; and mandamus will not lie to compel the defendant, who, prior to the judgment, entered upon the discharge of the duties of the office under his certificate of election, to admit the contestant to the use and enjoyment of the office.

ID.—JUDGMENT—UNLAWFUL HOLDING OF OFFICE—QUO WARRANTO—CON-

STRUCTION OF CODE.—The judgment in an election contest cannot properly adjudge that the defendant is unlawfully holding the office; and the provision of section 949 of the Code of Civil Procedure, which provides that an appeal does not stay proceedings where the judgment "adjudges the defendant guilty of usurping or intruding into, or unlawfully holding public office," et cetera, applies only to the judgment in an action of *quo warranto*, or for the usurpation of office, and not to any judgment proper to be entered in an election contest.

APPLICATION in the Supreme Court for writ of mandate to compel the respondent to admit the petitioner to office, pending an appeal from a judgment rendered in favor of the petitioner in an election contest against the respondent in the Superior Court of Yuba County. E. A. Davis, Judge.

The facts are stated in the opinion of the court.

W. T. Phipps, for Petitioner.

W. H. Carlin, and J. E. Ebert, for Respondent.

HENSHAW, J.—An alternative writ of mandate was issued from this court, directed to the respondent, and ordering him to admit petitioner to the use and enjoyment of the office of auditor and recorder of the county of Yuba, or to show cause why he does not do so. At the hearing upon the return it was made to appear that at the general election held in 1898 the petitioner and the respondent were opposing candidates for the office of auditor and recorder of Yuba county. In due time the board of supervisors canvassed the vote cast at the election, and declaring Gunning to have been elected to the

office. A certificate of election was issued to him accordingly. Within the time contemplated by law the petitioner instituted a contest of the election under the provisions of title 2, part 3, of the Code of Civil Procedure. The contest was heard in the superior court, the votes were counted, and as a result the court gave its judgment that the contestor, the petitioner herein, was duly elected to the office, and "that said defendant and respondent is unlawfully holding said office; that the certificate of election to said office heretofore issued to said respondent for said office is hereby revoked, annulled, set aside, and canceled; that the clerk of the said county of Yuba is ordered to issue to said Fred H. Day a certificate of election to said office, and that upon properly qualifying said Fred H. Day be let into possession of said office." Thereafter, and within ten days of the date of the judgment, Gunning appealed to this court, giving the ordinary three-hundred-dollar bond upon appeal. Between the date of the institution of the election contest and the date of the judgment therein the term of the auditor-elect commenced. By virtue of his certificate of election Gunning entered the office and discharged its duties. He was so in possession and so discharging its duties at the time when the judgment was rendered against him in the election contest. After that judgment Day duly qualified and made demand upon Gunning to be let into possession of the office, with which demand Gunning refused to comply.

Under these facts it is seen that the legal question presented is the single one, namely: Whether an appeal from a judgment such as this operates as a *supersedeas*. Generally speaking, an appeal to this court, accompanied by the three-hundred-dollar undertaking, stays the execution of the judgment, excepting judgments in certain enumerated kinds of cases. As an appeal in contested election cases is accorded to either party under section 1126 of the Code of Civil Procedure it must follow that unless the judgment which the court is authorized to enter in such a case belongs to one or another of the excepted classes, the appeal does operate to stay its enforcement. Section 949 of the Code of Civil Procedure provides that the perfecting of an appeal stays proceedings in the court below upon the judgment, excepting where the

judgment "adjudges the defendant guilty of usurping or intruding into or unlawfully holding public office, civil or military, within this state." It is contended by petitioner that the judgment in this case is one declaring that the contestee unlawfully holds a public office, and that, therefore, the perfection of the appeal does not stay the enforcement of the judgment. But it would not matter that the judgment so declared, unless it were within the power of the court in this proceeding to pronounce such a judgment. This is an action to contest an election, the judgment in which may be one of three—a judgment of dismissal, a judgment setting aside and annulling the election, or a judgment declaring that the contestee or some other person has received the highest number of legal votes, and is, therefore, elected. It was this last kind of judgment which the court gave, but it added to it the unauthorized declaration that the contestee was unlawfully holding office. Such a judicial declaration is appropriate to the action of *quo warranto*, or usurpation of office, which is an entirely distinct proceeding from the one which was here employed. Section 803 of the Code of Civil Procedure authorizes the commencement of an action against any person who "usurps, intrudes unto, or unlawfully holds or exercises any public office, civil or military, or any franchise within this state." This language is identical with that above quoted from section 949 of the same code, and it is quite apparent upon the reading of the two sections that it is to such a judgment in *quo warranto*, or for usurpation of office, that section 949 has reference. Within the reading of those sections it cannot be said that the respondent is unlawfully holding his office. Assuredly, he entered upon it lawfully by virtue of his certificate of election. If, by matters arising after his incumbency, he has lost the right to retain the office, still it cannot be adjudged in this proceeding that he is usurping, or intruding, or unlawfully holding office, within the intent and meaning of section 949. In this respect the case would be parallel with that of *Covarrubias v. Supervisors*, 52 Cal. 622. See, also, *Morton v. Broderick*, 118 Cal. 474.) Moreover, having regard to the nature of the proceeding upon contested elections, it will be observed that it is designed as

speedily as may be to determine the question: 1. Whether a given election was legally held; and, 2. To decide which of two or more opposing candidates has been legally chosen to office. No question of usurpation, of unlawfully intruding, or of illegal holding, enters into this consideration. Indeed, the time limited for the commencement of such a contest, and the requirement that the court shall sit in special session to hear and determine it, indicate that it was the purpose of the law that a judgment should be rendered before the term of office actually commenced. It is by chance, in this case, that the hearing continued after the commencement of the term, and that the determination was reached when one of the candidates had been inducted into office by virtue of his certificate. But this circumstance does not change the form of the proceeding or authorize the entry of a judgment not provided for therein. It might be a wise provision of the law to declare that in such contests the successful party shall, by virtue of the judgment of the trial court, be immediately let into possession of the office. In some states will be found that or similar provisions. There is none such upon our own books, and in the present condition of the law it must be held that the perfecting of the appeal by the party aggrieved, *ipso facto*, operates as a *supersedeas*.

The application for the writ is therefore denied.

Temple, J., Harrison, J., Garoutte, J., and Van Dyke, J., concurred.

[S. F. No. 1023. Department Two—August 7, 1899.]

W. H. HAMILTON, Respondent, v. F. M. SMITH, Appellant.

LEASE—ACTION FOR RENT—RECOUPMENT FOR MISREPRESENTATIONS—EVIDENCE OF DAMAGE—FINDINGS.—In an action for a balance of unpaid rent upon a lease of a house, where recoupment of damages was claimed on account of misrepresentations as to the capacity of the house which induced the defendants to execute the lease, and the only evidence tending to show damage was the payment of a sum for additional rooms, which sum was remitted from the judgment on motion for a new trial, they are not injured by erroneous findings of fact on the question of damages, and cannot claim an additional

allowance for the difference in rental value of such a house as it was represented to be, and such as in fact it was, there being no evidence to show such difference beyond the payment made for other rooms.

APPEAL from a judgment of the Superior Court of Alameda County, and from an order denying a new trial. F. B. Ogden, Judge.

Under the lease sued upon the lessee was obligated to pay thirty-two dollars per day for the rent of a house on Rosalie Court, Chicago, for the month of May, 1893, and four dollars per day for each room retained thereafter in June. The sum of five hundred dollars was to be paid April 1st, the date of the execution of the lease, and the remaining four hundred and ninety-two dollars for the month of May was to be paid May 15, 1893. The action was for an unpaid balance of rent for May in the sum of four hundred and fifty-seven dollars and eighty-five cents, and for twenty dollars for the use of a piano during that month. The defendant pleaded that, relying wholly upon the statements of the lessors, he was induced to execute the lease by their false and fraudulent representations that the house contained eight bedrooms, besides a parlor, diningroom, and kitchen, whereas it contained four bedrooms only; that the accommodations were insufficient for his family, and he was obliged to secure other apartments; that a house in that locality was worth four dollars per day for each and every bedroom during said term; and that plaintiff had been damaged in the sum of four hundred and seventy-seven dollars and eighty-five cents, for which judgment was asked. Further facts are stated in the opinion of the court.

Chickering, Thomas & Gregory, for Appellant.

The finding against the allegations of the answer is contrary to the evidence. The finding against an intent to defraud the defendant is immaterial. The representations being material and false, were fraudulent as matter of law, without regard to intent. (Civ. Code, sec. 1572, subd. 2; *Bank of Woodland v. Hiatt*, 58 Cal. 234; *Groppengiesser v. Lake*, 103 Cal. 37.) The defendant had the election either to rescind, or to take possession under the lease, and recoup the

damages suffered from the fraud in obtaining the lease in an action for the rent. (*Whitney v. Allaire*, 4 Denio, 554; *Holton v. Noble*, 83 Cal. 7; *Barr v. Kimball*, 43 Neb. 766; 2 Pomeroy's Equity Jurisprudence, sec. 872; *Miller v. Barber*, 66 N. Y. 558; *Foulk v. Eckert*, 61 Ill. 318; *Buena Vista Co. v. Tuohy*, 107 Cal. 243; *Bancroft v. Bancroft*, 110 Cal. 374; Bigelow on Frauds, sec. 184.) The representations need not have been inserted in the lease. (*Newman v. Smith*, 77 Cal. 22.) The judgment should be reversed for want of a finding upon the amount of damage. The measure of damages is the difference between the value of the premises represented and the premises actually occupied. (*Hadley v. Blazendale*, 9 Ex. 341; *Townsend v. Nickerson Wharf Co.*, 117 Mass. 501; *Trull v. Granger*, 8 N. Y. 115; *Woodhull v. Rosenthal*, 61 N. Y. 394; Taylor on Landlord and Tenant, sec. 177.) The difference in value as shown by the lease and the testimony was four dollars per day for each bedroom lacking.

John C. Hughes, for Respondent.

The representations were not fraudulent in law, the lessors not having had reason to believe them untrue, and not having intended to deceive. (*Hanscom v. Drullard*, 79 Cal. 234; *Davidson v. Jordan*, 47 Cal. 351; *Daley v. Quick*, 99 Cal. 179; *Kountze v. Kennedy*, 147 N. Y. 124; 49 Am. St. Rep. 651; *Nash v. Minnesota etc. Co.*, 159 Mass. 437.) The only measure of damages is the actual pecuniary loss suffered. (*Holton v. Noble*, 83 Cal. 7; *Hanscom v. Drullard*, *supra*.) Defendant has already received credit for more damages than he is justly entitled to under the evidence, and he is entitled to nothing further.

TEMPLE, J.—This action was brought to recover a balance due on a lease. The defense is fraud in procuring the lease. Defendant rented a house from plaintiff's assignors, in Chicago, for one month during the World's Fair. Defendant was a resident of Oakland, where the lease was entered into. He had never seen the house, as the lessors knew, but relied solely upon their representations. They represented that it contained eight bedrooms. Defendant avers that in fact there

were but four bedrooms. He found it difficult or impossible to get other accommodations for his family in Chicago at that time, and so did put up with the house he had rented. Beds were placed in the parlor and diningroom, and, although put to much inconvenience, the house was made to answer his purpose. His lease was in writing, and in it no mention is made of any bedrooms. It is not charged that there was any violation of its terms, but defendant seeks to recoup for damages for the false representations by which he was induced to enter into the contract. The court found that the plaintiff's assignors did represent that there were eight bedrooms, but finds that the representation was not fraudulent. In fact, it was found that there were eight bedrooms, for it is found that all the other allegations of the answer, except as to the representations regarding the number of the bedrooms were untrue. The appeal is from the judgment and from the refusal of a new trial.

Appellant contends, and the contention is well founded, that as to some of the allegations the finding is against the evidence. But if all had been found for the defendant he could not have had judgment allowing a recoupment for more than seventy-five dollars, and as a condition for refusing a new trial plaintiff was required to and did remit that amount from his judgment. This was all the damages he attempted to prove.

He now says he was entitled to the difference in the rental value of such a house as they represented it to be, and such as it in fact was. But, conceding that rule, there was no evidence even tending to show the difference. His inconvenience is not shown to have cost him anything except the seventy-five dollars which he paid for other rooms.

It appears, therefore, that he is not injured by the erroneous findings of fact.

Order and judgment affirmed.

Henshaw, J., and McFarland, J., concurred.

Hearing in Bank denied.

[S. F. No. 1208. Department Two.—August 7, 1899.]

CITY AND COUNTY OF SAN FRANCISCO, Respondent,
v. HONORA SHARP, Appellant.

STATUTORY CONSTRUCTION.—A statute relied upon as conferring rights to a governmental gratuity is to be strictly construed.

SAN FRANCISCO "HOSPITAL LOT"—DEDICATION TO PUBLIC USE—ORIGINAL POSSESSOR NOT ENTITLED TO COMPENSATION.—One claiming under an original possessor of pueblo land which was more than one-twentieth part of the lot designated on the Van Ness map as a "hospital lot," and which was dedicated to public use under the ordinances ratified by the act of March 11, 1858, and the confirmatory act of Congress of July 1, 1864, has no title or estate in the lot which could be asserted against the United States, the state or the city, and is not entitled under section 6 of the Van Ness ordinance to any compensation as a condition precedent to the quieting of the title of the city to such "hospital lot."

ID.—TERMS OF ORDINANCE NO. 822 SUPERSEDED BY RATIFICATION OF VAN NESS MAP.—The terms of section 6 of the Van Ness ordinance were superseded so far as inconsistent with the Van Ness map showing the reservation of lots, blocks, and squares for public use, and with the order adopting said map, and the legislative ratification thereof, which operated immediately to dedicate the lots to public use.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. J. M. Seawell, Judge.

The facts are stated in the opinion.

Rodgers & Paterson, and William B. Sharp, for Appellant.

By the ratification of order No. 822, by the act of 1858, appellant became a beneficiary entitled to compensation under section 6 of that order. The intention of the legislature expressed upon the face of the ratification must prevail. (*San Francisco v. Mooney*, 106 Cal. 588.) The ratification was for the benefit of lot claimants, as well as for public uses. (*Knight v. United States Land Assn.*, 142 U. S. 161; *Palmer v. Low*, 98 U. S. 1; *San Francisco v. Le Roy*, 138 U. S. 656; *San Francisco v. Canavan*, 42 Cal. 555; *Baker v. Brickell*, 87 Cal. 333.)

Harry T. Creswell, City and County Attorney, and Gailard Stoney, Assistant, for Respondent.

The title to the public squares never did vest in the possessors; the city simply reserved what was her own, and it was a matter of no consequence that she took more than one-twentieth of the land in the possession of any one person without compensation, as such person had nothing for which compensation could be exacted. (*Sawyer v. San Francisco*, 50 Cal. 370; *Hoadley v. San Francisco*, 70 Cal. 324; *Hoadley v. San Francisco*, 50 Cal. 272; *Board of Education v. Martin*, 92 Cal. 217; *San Francisco v. Mooney*, 106 Cal. 586; *Hoadley v. San Francisco*, 124 U. S. 645; *People v. Holladay*, 68 Cal. 439.)

BRITT, C.—Action by the city and county of San Francisco to quiet title to the tract of land which was designated on the Van Ness map of 1856 as a “hospital lot,” and which was originally part of the pueblo lands of the city within the corporate limits as defined by the act of April 15, 1851. Such tract was within the scope of ordinance No. 822 of the common council of the city approved June 20, 1855—the Van Ness ordinance, and the other ordinances following thereon, relating to the disposition of said pueblo lands, all of which were ratified in terms by the act of the state legislature approved March 11, 1858. (Stats. 1858, p. 52.) Defendant has possession of a portion of said tract, and the possession so held by her is continuous with that of her predecessors in interest, beginning at a time prior to January 1, 1855. The court below rendered judgment declaring that plaintiff is the owner of the land in suit “in trust for the use and benefit of the people of the state of California, and the inhabitants of the city and county of San Francisco, for the purposes of a public hospital”; and that defendant has no right or interest in any part of the same.

On appeal, defendant abandons sundry of the defenses set up in her answer, and admits that as a result of the legislation above referred to, and the confirmatory act of Congress of July 1, 1864, the said lot was dedicated to public use for purposes of a hospital; but she claims, as we understand the argument, that she is entitled to occupy the part thereof in her possession as aforesaid until the city shall pay to her the value of the same—found by the court to be the sum of seventy-five thousand dollars—and that the judgment was

erroneous in not requiring the city to compensate her to the amount of such value as a condition precedent to quieting its title against her.

The several ordinances mentioned are cited at length in the said act of 1858; and the steps taken by the common council of the city and the commission appointed by it, for the selection of public grounds to be reserved from the general granting provisions of ordinance No. 822, have been described in a number of cases involving the effect thereof as ratified by the legislature, and need not be here rehearsed. (See *Hoadley v. San Francisco*, 50 Cal. 265; 124 U. S. 639; *Sawyer v. San Francisco*, 50 Cal. 370; *Board of Education v. Martin*, 92 Cal. 209.) The claim of the defendant to pecuniary compensation, as above stated rests on the provision of section 6 of ordinance No. 822 that "the city shall not, without due compensation, occupy for the purposes mentioned in this section" (which included sites for hospitals) "more than one-twentieth part of the land in the possession of any one person." The court found that at the time the said hospital lot was selected and dedicated to public use the portion of the same then in the possession of defendant's said predecessors in interest "comprised more than one-twentieth of the lands in their possession between January 1st and June 20, 1855."

Since the persons through whom defendant claims had no estate in the land which they could assert against the United States, the state of California, or the city, they were equally without legal right to be paid for the same when by appropriate legislation it was dedicated to public uses in charge of the city; the claim now made is therefore to a governmental gratuity, and the statute under which it is advanced—the act of March 11, 1858—is to be construed strictly against the pretensions of the claimant; ambiguities therein, if any, are to be resolved against the demand. (*Oakland v. Oakland Water Front Co.*, 118 Cal. 160.) Three ordinances were ratified by the act of 1858. Section 6 of the first—No. 822—contained several restrictions on the power to reserve lots for public uses; thus, it was declared that public squares or parks "shall not embrace more than one block, corresponding in size to the adjoining blocks"; also that the selection of lots to be reserved "shall be made within six months

from the time of the passage of this ordinance"; and that the city should not occupy more than one-twentieth part of the land in the possession of any one person "without due compensation." But it is perfectly clear that the third of said series of ordinances—the order of October 16, 1856, adopting the Van Ness map—was passed in utter disregard of the said restrictions of ordinance No. 822, relating to the time limit for the selection of the reserved lands and relating to the size of the parks; for such limit of time expired December 20, 1855, not having been previously extended, and the Van Ness map showing the selections made by the commissioners was not reported to the common council until April 19, 1856; while the public squares shown on the map and dedicated by its adoption included in most instances four blocks, instead of one as provided by ordinance No. 822. These departures from the original scheme have been held to affect in no wise the dedication of the reserved grounds. (*San Francisco v. Mooney*, 106 Cal. 586, and cases cited.) The language of the order of October 16, 1856, was that the Van Ness map be adopted "in respect to the reservation of squares and lots for public purposes"; by the ratification of this order in the statute of 1858 it acquired the force of law, and operated immediately to dedicate the lots to public use. (*Hoadley v. San Francisco*, *supra*.) Since, therefore, the order of October 16 had, and was obviously intended to have, this effect, notwithstanding that it ignored some of the most important of the conditions which, by the terms of ordinance No. 822, hampered the right of the city to reserve land for its own purposes, it is a very natural inference that it was meant to disregard also the provision by which the city was to be required to pay the possessors of the lots dedicated for something they did not own, viz., the right to occupy the same. If this is not so we should have the anomaly of land completely dedicated to public uses, which yet the public cannot use without paying its value to persons who have no title or estate in the land itself. While such a condition might possibly be created by statute, all intendments in the construction of the act of 1858 should, for reasons already stated, be indulged against it.

The effect of the analogies above suggested is sought to be

avoided on the ground that section 6 of ordinance No. 822 did not forbid the city to take more than one-twentieth of the land possessed by any one person, but, on the contrary, contemplated that more might be taken upon making compensation to the occupants, and that accordingly the actual dedication of more than one-twentieth of the lands possessed by defendant's grantors shows no intent not to pay for it. This is hardly a sufficient answer; the question in one case (for example) is whether the legislature intended to dedicate finally land which by the terms of said section 6 was not subject to reservation at all; in the other (the case here), whether it intended to dedicate finally land which the same section forbade to be occupied—certainly an indispensable step in any effectual dedication to public use—without paying the value to the possessors. It seems to us that the present and complete dedication contemplated by the order of October 16, 1856, confirmed by the statute of 1858, was inconsistent alike with all the restrictions of said section 6. (See *Sawyer v. San Francisco*, 50 Cal. 370; *Holladay v. San Francisco*, 124 Cal. 352.) The present decision might, perhaps, be rested on the authority of *Sawyer's* case just cited; but defendant characterizes the view there expressed touching the present subject as dictum merely, and contends that for other reasons it is not controlling; and since, besides this case, there are others now pending for decision in which reliance is placed on the main contention urged for defendant here, we have preferred to respond directly to the question of the proper construction of the statute of 1858. We think defendant is not entitled to the compensation she claims, and that the judgment appealed from should be affirmed.

Chipman, C., and Haynes, C., concurred.

For the reasons given in the foregoing opinion the judgment appealed from is affirmed.

Henshaw, J., Temple, J., McFarland, J.

[S. F. No. 1970. Department One.—August, 1899.]

In the Matter of the Estate of THOMAS BELL, Deceased.
THERESA BELL, Appellant.

ESTATES OF DECEASED PERSONS—ORDER CONFIRMING EXECUTOR'S SALE—

APPEAL—FAILURE TO SERVE NOTICE UPON PURCHASER—DISMISSAL.

—Upon appeal from an order confirming a sale by an executor, taken by an heir of the decedent, it is not sufficient to serve the notice of appeal upon the executor alone, but it must also be served upon the purchaser at the sale, who is an "adverse party," vested with a right to the property purchased upon the payment of the purchase money, and, for failure to make such service, the appeal may be dismissed, upon his motion, for want of jurisdiction to entertain it.

MOTION to dismiss an appeal from an order of the Superior Court of the City and County of San Francisco confirming a sale by an executor. J. V. Coffey, Judge.

The facts are stated in the opinion of the court.

R. M. F. Soto and Noble Hamilton, for Appellant.

Sidney V. Smith, for Respondent.

THE COURT.—Motion to dismiss the appeal. The superior court for San Francisco made an order in the above-entitled estate confirming a sale by the executor of certain personal property to H. M. A. Miller, and directing the executor to execute to him an assignment and transfer of the interest of the estate therein. From this order Theresa Bell, one of the heirs of the deceased, has appealed, serving the notice of her appeal upon the executor alone. A motion is now made on behalf of Miller to dismiss the appeal for want of the service of this notice upon him.

The interest of Miller in the confirmation of the sale was "adverse to that of the heirs, and, as this interest is shown in the decree itself, it appears by the record that he was an 'adverse party,' and the notice of appeal should have been served upon him. By the decree of confirmation he became vested with the right to the property purchased by him, upon the payment of the purchase price, and by such payment he

has become entitled to a transfer thereof from the estate of the decedent. As a reversal of the decree would deprive him of this right, it was essential that he should be brought before this court before it could have any jurisdiction to make such reversal, or to entertain the appeal. (See *Eckstein v. Calderwood*, 34 Cal. 658.)

The motion is granted.

[S. F. No. 1771. Department One.—August 8, 1899.]

J. F. CLARKE, Appellant, v. H. MOHR et al., Respondents. TIMOTHY HURLEY, Intervenor, Appellant.

APPEAL—DISMISSAL—UNDERTAKING ON NEW TRIAL ORDER—CONSIDERATION—ALTERATION.—An undertaking on appeal from an order denying a new trial before it is entered is without consideration; and the subsequent interlineation of the date of the order in such undertaking is an alteration which discharges the sureties from all obligation thereupon, and such appeal must be dismissed.

ID.—APPEAL FROM JUDGMENT—SUFFICIENCY OF UNDERTAKING—SURPLUSAGE.—The undertaking upon appeal from the judgment is distinct from that upon appeal from the order denying a new trial, though both may be included in the same instrument, and, where such undertaking is supported by a sufficient consideration, and was filed in proper time, the invalidity of the undertaking upon appeal from the new trial order or a material alteration therein does not affect the appeal from the judgment, but the language in reference to the new trial order may be regarded as surplusage.

ID.—SERVICE OF NOTICE OF APPEAL.—The notice of appeal from a judgment is not required to be served upon defendants who do not appear from the record to have been served with summons, or to have appeared in the action.

ID.—DISMISSAL—GROUNDS OF MOTION—WANT OF SUFFICIENT UNDERTAKING—WAIVER.—An appeal cannot be dismissed for want of a sufficient undertaking where it is not made a ground of the motion of a respondent, as the respondent may have waived the giving of the undertaking.

MOTIONS to dismiss appeals from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. J. M. Seawell, Judge.

The facts are stated in the opinion of the court.

Alfred Clarke, for Appellant.

Wilson & Wilson, and H. Wilkins, for Kate C. Byrne and John E. Byrne, Respondents.

T. J. Crowlely, for H. I. Kowalsky, Respondent.

A. R. Cotton, and W. H. H. Hart, for Florence Blythe Hinckley, Respondent.

HARRISON, J.—Motions to dismiss the appeals. The plaintiff commenced this action to recover judgment in her favor upon a promissory note executed by the defendant, Kate C. Byrne, and for its payment out of the sale of a certain security given therefor, and also for determining the rights of the other defendants in the proceeds of said sale. Mrs. Byrne filed an answer to this complaint denying its several allegations. Complaints in intervention were thereafter filed by H. I. Kowalsky and by Timothy Hurley, and to these complaints answers were filed by the plaintiff and by Mrs. Byrne. The cause was tried by the court and judgment entered June 20, 1898, "that the intervenor Henry I. Kowalsky have and recover from the defendant Florence Blythe Hinckley the sum of fifteen hundred dollars, and that plaintiff take nothing by this action, and that said intervenor, Timothy Hurley, take nothing by this action, and that this action be dismissed as to all the other defendants therein." The motion for a new trial was denied December 2, 1898. From this order, and from the judgment, the plaintiff and the intervenor Hurley have appealed.

1. The defendants Byrne and the intervenor Kowalsky have moved to dismiss the appeals upon the ground that no sufficient undertaking on appeal has been filed in behalf of either appellant. These undertakings, for the sum of three hundred dollars each, are dated August 9, 1898, and on that day the sureties qualified as such before a notary public, but the undertakings were not filed until December 3, 1898. Each of the instruments recites that judgment has been rendered against the appellants therein "and motion for new trial was denied Dec. 3rd, 1898"; that the appellant is dissatisfied with said judgment "and denial of new trial," and

is desirous of appealing therefrom; that in consideration of the premises and of such appeal the sureties undertake and promise, et cetera.

It is claimed in support of the motions that the undertakings have been altered since their execution by the insertion and interlineation therein of the above-quoted words "and motion for new trial was denied Dec. 3rd, 1898," and the words "and denial of new trial," and that thereby the undertakings became invalid. There are many reasons, as well from the appearance of the undertakings themselves as from the circumstances connected with their filing, in support of the contention that the above interlineations were made after the instruments were signed and verified; but the appellants have presented affidavits by the sureties thereon, in which they state that with the exception of the words, "Dec. 3rd, 1898," the above-quoted words were inserted in the undertakings at the time they were signed. These affidavits are not contradicted, and we must hold that the facts are as therein stated.

At the time the instruments were signed the motion for a new trial had not been presented to the court for its consideration, and the order denying it was not made until December 2, 1898. There was, therefore, no right of appeal therefrom on behalf of either of the appellants at the time they were signed and verified, and consequently no consideration for the execution of an undertaking upon such appeal. The interlineation of the words, "Dec. 3rd, 1898," after the signing of the undertaking, was such an alteration of the contract entered into by the sureties as to discharge them from all obligation thereon. It is not shown when or by whom the alteration was made, but the respondents are entitled to an undertaking sufficient in both fact and form, and are not to be subjected to the necessity of showing that the sureties thereon are liable by reason merely of an estoppel *in pais*. The undertaking upon the appeal from the order denying a new trial must therefore be held invalid.

The undertaking on the appeal from the judgment is, however, distinct from that upon the appeal from the order denying a new trial, and, although both may be included in the same instrument, the validity of each is to be determined

by a reference to the appeal for which it is given. An appeal from the order is frequently dismissed, while that from the judgment is allowed to remain, and *vice versa*. The words in the instrument herein referring to the order denying a new trial do not affect the undertaking upon the appeal from the judgment and may be regarded as surplusage. At the time the instrument was signed by the sureties the judgment had been entered, and the subsequent appeal therefrom was a sufficient consideration to make it a valid and effective obligation whenever it should be filed. The statute does not require that the undertaking shall not be signed by the sureties until after the appeal is taken, or limit any time between the two acts, but merely requires that it shall be "filed" within five days after the service of the notice of appeal. (Code Civ. Proc., sec. 940.) The undertaking has no effect until that time, but upon being filed it becomes an executed and valid obligation upon the sureties. (See *Wheeler v. Farmer*, 38 Cal. 215.)

2. A motion is also made on behalf of the respondent Hinckley to dismiss the appeal upon the ground that the notice of appeal was not served upon certain other defendants. The record does not show, however, that either of these defendants were served with the summons in the action, or appeared therein, and consequently service upon them of the notice was not required. (Code Civ. Proc., sec. 1014.) Unless they had been brought before the superior court they would not be affected by its judgment, or by any reversal thereof by this court.

The want of a sufficient undertaking is not made a ground of the motion by this respondent and cannot therefore be considered. (*Pignaz v. Burnett*, 119 Cal. 157.) The respondent may have waived the giving of the undertaking.

The motions to dismiss the appeals from the judgment are denied. The appeals from the order denying a new trial are dismissed as to the respondents Kowalsky and Byrne, and the motion therefor by the respondent Hinckley is denied.

Van Dyke, J., and Garoutte, J., concurred.

Hearing in Bank denied.

[L. A. No. 498. Department One.—August 10, 1899.]

GEORGE A. TIBBET, Respondent, v. TOM SUE, Appellant.

ACTION UPON NOTE—CONSIDERATION—EVIDENCE—DECLARATIONS OF PLAINTIFF—CONDUCT OF DEFENDANT.—In an action upon a note, the consideration of which was assailed by one of the makers, evidence of the declarations of the plaintiff, made in the presence and hearing of both makers of the note, while counting out the money, that the plaintiff was loaning the money to them, and of the conduct of the defendant assailing the note, in then silently taking the money and walking away with it, is admissible in favor of the plaintiff.

ID.—CONFIDENTIAL COMMUNICATION—TIME OF STATEMENT TO ATTORNEY—HARMLESS EVIDENCE.—Where the defendant had testified that he signed the note several months after its date, under the representation that it was a receipt for five dollars, and that he did not tell his attorney about it when first sued, a question as to when he did tell his attorney is not objectionable as asking for a confidential communication, and an answer thereto that he told his lawyer about it when he employed him, cannot be to the injury of the defendant.

NEW TRIAL—NEWLY DISCOVERED EVIDENCE—DISCRETION.—A motion for a new trial upon the ground of newly-discovered evidence rests much in the discretion of the court, and the ruling of the court thereupon will not be disturbed, unless there has been a clear abuse of discretion.

ID.—SUSPICION AS TO NEW EVIDENCE—CLEAR SHOWING REQUIRED.—Newly discovered evidence after defeat is looked upon with suspicion; and the moving party must make a clear case showing due diligence on his part, and the truth and materiality of the evidence.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order denying a new trial. Lucien Shaw, Judge.

The note in suit was dated January 3, 1896, and the plaintiff and Frank Q. Dock testified that it was then signed by both of the makers, Tom Sue and Ham Gee, in Dock's restaurant in Bakersfield, and that five hundred dollars was then counted out and Tom Sue put it in a handkerchief and carried it away. Joseph C. Mefford and Charles Bustillos testified that they came into the restaurant and witnessed the payment of the money, but did not witness the signing of the note. Further facts are stated in the opinion.

William J. Hunsaker, for Appellant.

J. E. Patten, R. A. Ling, and McKinley & Graff, for Respondent.

COOPER, C.—Action to recover on a promissory note for five hundred dollars and accrued interest. Judgment for plaintiff. Defendant Tom Sue appeals from the judgment and from an order denying his motion for a new trial. The appeal comes here on the judgment-roll and a bill of exceptions. Findings were filed by the court below, and it is conceded that the judgment is the legal conclusion from the facts found.

It is claimed that the evidence is insufficient to justify the decision of the court. The argument in appellant's brief is mainly directed to the improbability of the truth of the testimony of the witnesses for respondent. As the witnesses appeared before the learned judge of the court below, where he could view them as the words fell from their lips, it was his peculiar province to pass upon their credibility, and after he has found the facts as stated by them and indorsed their testimony as true, we have no power to disturb his findings, when based upon substantial testimony.

The real issue between respondent and appellant was as to the execution of and consideration for the promissory note described in the complaint. One Bustillos was called as a witness by plaintiff, and testified that he was present in the early part of January, 1896, in the restaurant of one Dock in Bakerfield, and saw plaintiff come in and also saw two Chinamen there. That plaintiff had some money and was counting it out. That one Mefford, who was in company with witness, asked plaintiff what he was doing with the money. The witness was allowed, under the appellant's objection, to testify that the plaintiff said: "I am loaning these Chinamen this money." Appellant's counsel says: "This action of the court constitutes the principal error of law relied upon for a reversal of the judgment." The evidence was objected to upon the ground that it was hearsay and incompetent. After the testimony was in, a motion was made to strike it out, but no grounds of said motion were stated. It is now urged that the ruling was reversible error, for the reason

that the conversation was not with appellant; that it does not appear that he understood what was being said, and that there is no evidence of his conduct in regard to the statement. It is shown by the evidence that appellant was present; that he can speak English imperfectly, and that he took the money and walked away. The objection to this testimony was made solely upon the grounds that it was hearsay and incompetent, and no other grounds can now be considered. We think the court did not err in admitting the testimony. The statement was made in the presence and hearing of defendant, and his silence and taking the money and walking away with it was evidence sufficient as to his conduct. Our code (Code Civ. Proc., sec. 1870), provides that, among other things, evidence may be given at the trial of "an act or declaration of another, in the presence and within the observation of a party, and his conduct in relation thereto." It is said in 1 Rice on Evidence, page 468: "Declarations or statements made in the presence of a party are received in evidence, not as evidence in themselves, but to understand what reply the party to be affected by the statement should make to the same. If he is silent when he ought to have spoken, the presumption of acquiescence arises; in this sense, admissions may be implied from conduct."

In *Corser v. Paul*, 41 N. H. 24, 77 Am. Dec. 753, a note purporting to be signed by a party was shown to him with a request to pay it. It was held that his silence was competent evidence as to the genuineness of his signature. The court in the opinion said: "No principle is better settled than that a man's silence upon an occasion where he is at liberty to speak, and the circumstances naturally calling upon him to do so, may be properly considered by the jury as tacit admissions of the statements made in his presence, or of the claims there made upon him."

In *People v. Young*, 108 Cal. 13, it appeared that the defendant after his arrest was brought into the presence of the wounded man, and a conversation then occurred between the wounded man and a third party as to the ownership of a certain purse found upon the defendant at the time of his arrest. The conversation was not addressed to defendant, but he was present at the time and in a position to hear all

that occurred, and neither affirmed or denied the statement of the deceased, to the effect that the purse was his property. It was held that his silence under the circumstances was a fact to which the jury were entitled. So in *People v. Mallon*, 103 Cal. 514, two witnesses were allowed to testify to statements made by one Foran in the presence of defendant. It did not appear that the conversation was addressed to defendant or that he made any reply thereto, but this court held the evidence competent, and in the opinion said: "It is established law that, while a statement made in the presence of the accused is not admissible as being itself evidence of any fact narrated in such statement, it is admissible, primarily, for the purpose of showing that the accused acquiesced in the statement either by express assent, or by silence, or by such conduct as fairly implied assent."

The ruling appears to be within the rule as laid down in the cases cited, and we are not prepared to say that it would be reversible error even if not within the rule, in view of the other testimony in the case. The declaration of itself was of little importance, and particularly as the case was being tried before the court without a jury, we cannot see that a different result would have been at all probable if the evidence had been excluded.

The appellant was a witness in his own behalf, and it did not appear by his testimony or otherwise that he did not understand the English language. While the appellant was on the stand as a witness he testified that about the 1st of April, 1896, he was keeping a dry goods store in Los Angeles. That at that time, while he was eating supper, Bustillos came into appellant's place of business with a letter written in Chinese and with the sum of five dollars, and presented the note described in the complaint to appellant and asked him to sign it as a receipt for the money. That he thought Bustillos was the agent of Wells, Fargo & Co., and the note a receipt for the five dollars, and that under this belief he signed it. In cross-examination appellant testified that he never told of the fact of signing the receipt and receiving the five dollars to anyone until he was sued, and that he did not tell his attorney about it at that time because he did not know what the suit was for. Then he was asked the following question: "Q. When did you tell your attorney?" This question was ob-

jected to by appellant's counsel on the ground that it involved a confidential communication; the objection was overruled, and the ruling is now claimed to be error. The appellant, in answer to the question, said that when he went to employ his lawyer then he imagined the cause and told his lawyer so. The question related to the time when appellant told his attorney certain facts which he had fully testified to in his examination in his own behalf. He had said of his own volition that he did not tell his attorney at the time he was sued, thus in effect stating that he had told his attorney. The question, therefore, as to the time he so told him was not asking for a confidential communication. But, aside from this, the fact that appellant told his attorney in preparing his defense of the facts set up in his answer, and of the facts testified to by him, could not in any degree have injured him. It was to allow appellant to corroborate his evidence upon the trial by showing that he had before stated the same thing to his attorney. If appellant had offered to prove such statement to his attorney, and it had been objected to by plaintiff, no doubt the objection would have been sustained; but, as he was allowed to state the declaration to his attorney in reply to plaintiff's question, and as the declaration was in his own favor, and in corroboration of his evidence upon the stand, it could not possibly have injured him.

One of the grounds of appellant's motion for a new trial was newly-discovered evidence, but he has not seen fit to argue the point in his brief. The record shows that appellant, in support of his motion upon said ground, read some nine affidavits, and the respondent, in opposition thereto, read some nineteen. The greater portion of the affidavits was directed to the credibility of the witnesses for plaintiff. Motions of this kind rest much in the discretion of the trial court. The moving party must make a clear case, showing due diligence on his part and the truth and materiality of such evidence. Newly-discovered evidence after defeat is looked upon with suspicion, and this court is always reluctant to interfere with the ruling of the trial court on a motion for a new trial on that ground, and will not do so unless there has been a clear abuse of discretion. (*Harralson v. Barrett*, 99 Cal. 607.) There was no such abuse of discretion in this case.

We advise that the judgment and order be affirmed.

Haynes, C., and Britt, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are affirmed.

Garoutte, J., Van Dyke, J., Harrison, J.

[L. A. No. 497. Department One.—August 10, 1899.]

ISAAC LASAR et al., Respondents, v. C. O. JOHNSON et al., Appellants.

SUBSCRIPTION FOR ENTERTAINMENT OF DELEGATES—CONSIDERATION—OBLIGATIONS INCURRED AT SUBSCRIBERS' REQUEST.—Under a subscription to a fund to be paid to a committee of a Parlor of Native Sons toward the expense of entertaining delegates to a meeting of the Grand Parlor, the request of subscribers, upon demand of payment, that the committee should regard their subscription as cash, and proceed with their arrangements, and the action of the committee in incurring obligations on the faith of the request was a sufficient consideration to fix the liability of the subscribers.

ID.—TIME OF REQUEST.—It is not necessary that such request should be made at the time of the subscription.

ID.—SUBSCRIPTION BY HOTELKEEPERS—CONTRACT—COMPLIANCE WITH CONDITIONS.—A subscription by hotel-keepers under an agreement with the committee that either a ball or a banquet should be given to the delegates at their hotel, and, in case neither was given, the subscription should be reduced one-half, is converted by such agreement into a contract, and the giving of a ball thereat in compliance with the condition of the agreement is a good consideration for the promise to pay the full amount of the subscription; and no question can be raised as to any reduction of the liability.

ID.—SUBSCRIPTION FOR "ENTERTAINMENT" OF DELEGATES—CONSTRUCTION.—A subscription for the entertainment of a large number of strangers coming as delegates to the meeting of an organized body is not to be construed as limiting the entertainment to board or to the ordinary necessities of life, and all reasonable expenditures made and liabilities incurred in connection with the entertainment of such a body, including the expenses of a ball and banquet given for their enjoyment, are fairly within the meaning and intent of the subscription.

ID.—ACTION BY MEMBERS OF COMMITTEE—PARTIES—TRUSTEES OF EXPRESS TRUST—PLEADING—DEFECTIVE TITLE TO COMPLAINT.—In an

action upon a subscription payable "to the subscription committee of Los Osos Parlor," brought by the individuals constituting such committee, if the body of the complaint shows that they constituted and acted as such committee, and were the trustees of an express trust, the Parlor which was the beneficiary of the trust need not be joined as a party; and a defect in the title in not showing the trust relation of the plaintiffs cannot be objected to otherwise than by special demurrer.

1D.—DEFENSE—PAYMENT OF EXPENSES BY COMMITTEE—BORROWED MONEY.—It is no defense to such action that the expenses of the entertainment of the delegates were paid by the committee, where it appears that a deficiency greater than the amount of the subscription sued upon was met by borrowing the amount from one of the funds of the Parlor, not intended to be used for such entertainment.

APPEAL from a judgment of the Superior Court of San Luis Obispo County and from an order denying a new trial. E. P. Unangst, Judge.

The facts are stated in the opinion.

Wilcoxson & Bouldin, and J. M. Wilcoxson, for Appellants.

The complaint does not show a cause of action. The promise was gratuitous and cannot be enforced. (*Cottage Street Church v. Kendall*, 121 Mass. 528; 23 Am. Rep. 286.) "Entertainment" is synonymous with board, and includes the ordinary necessities of life. (Black's Law Dictionary, tit. "Entertainment.") The expenditures incurred were for such purposes as to constitute no liability against this defendant under the terms of the subscription. To sustain the judgment is to take money from the defendants and give it to the order of Native Sons, without compensation. (*Trustees v. Stewart*, 1 N. Y. 581.) The amount properly expended being less than the whole amount subscribed, the recovery should be limited to a *pro rata* share thereof. (24 Am. & Eng. Ency. of Law, 341.)

Graves & Graves, E. Green, and F. A. Dorn, for Respondents.

The subscription, under the terms of the agreement, made, was a contract, the liability of which became absolute upon compliance with its terms. (Civ. Code,

secs. 1605, 3521; *Peers v. McLaughlin*, 88 Cal. 294, 22 Am. St. Rep. 306; 1 Anson on Contracts, 90, 91; 1 Parsons on Contracts, 437 et seq.) The expenditure of money and the incurring of liability on the faith of the subscription is a consideration to support the promise. (*Pratt v. Trustees*, 93 Ill. 475; 34 Am. Rep. 187; *Galt v. Swain*, 9 Gratt, 633; 60 Am. Dec. 311; *Des Moines University v. Livingston*, 57 Iowa, 307; 42 Am. Rep. 42; 65 Iowa, 202; *McCabe v. O'Connor*, 69 Iowa, 134; *Hopkins v. Upshur*, 20 Tex. 89; 70 Am. Dec. 375; *Trustees v. Garvey*, 53 Ill. 401; 5 Am. Rep. 51; *Roberts v. Cobb*, 103 N. Y. 600; Parsons on Contracts, 452.) The compliance with defendants' request was sufficient consideration for the promise. (*Philomath College v. Hartless*, 6 Or. 158; 25 Am. Rep. 511; *Barnes v. Perine*, 12 N. Y. 18; *Trustees v. Stewart*, 1 N. Y. 582; *Presbyterian Church of Albany v. Cooper*, 112 N. Y. 517; 8 Am. St. Rep. 767; *Baptist Church v. Cornell*, 117 N. Y. 601.) The objection to the defective title of the complaint goes only to the legal capacity to sue, and is waived, if not taken by special demurrer. (*Phoenix Bank v. Donnell*, 40 N. Y. 412; *Mora v. Le Roy*, 58 Cal. 8; *District No. 110 v. Feck*, 60 Cal. 405; *Phillips v. Goldtree*, 74 Cal. 154.) The complaint shows that plaintiffs are the trustees of an express trust, and are entitled to sue without joining the beneficiary. (Code Civ. Proc. sec. 369; *Considerant v. Brisbane*, 22 N. Y. 389; Pomeroy's Code Remedies, sec. 175, and note; *Winters v. Rush*, 34 Cal. 136; 24 Am. & Eng. Ency. of Law, 339; *Hopkins v. Upshur*, *supra*; *State Treasurer v. Cross*, 9 Vt. 289; 31 Am. Dec. 626.) The expenditures were all within the proper scope of "entertainment" of such a visiting body. (6 Am. & Eng. Ency. of Law, 650; *Holmes v. Board etc.*, L. R. 1 Ex. Div. 385; Webster's Dictionary, 452.)

HAYNES, C.—The complaint alleges that plaintiffs constitute the subscription committee of Los Osos Parlor, No. 61, of the Native Sons of the Golden West, a social and benevolent organization in the city of San Luis Obispo, who, for the purpose of entertaining the grand parlor of said organization at their meeting in said city from April 26, 1896, to and including May 1, 1896, procured the signature of the defendants to a subscription paper, of which the following is a copy:

"San Luis Obispo, Cal., January 1, 1896.

"We, the undersigned citizens and business men of the city of San Luis Obispo, do hereby agree to pay the amounts set opposite our respective names to the subscription committee of Los Osos Parlor, No. 61, N. S. G. W., on or before the fifteenth day of March, 1896, at the city of San Luis Obispo. The money so paid to be used in entertaining delegates to the grand parlor of the N. S. G. W. during their stay in the city of San Luis Obispo.

"Jack & Johnson, Ramona Hotel, \$500.00."

The complaint further alleged that "defendants signed, executed, and delivered to plaintiffs said instrument upon the express condition, and the consideration therefor, and the promise contained therein, was that said committee should entertain the delegates to the grand parlor of the Native Sons of the Golden West during their visit and stay in the city of San Luis Obispo with social pleasures and entertainment, and that a ball or banquet should be tendered and given said delegates at defendants' hotel"; that said grand parlor was convened and held during the time stated; that the delegates were entertained by social pleasures and amusements; that a ball was given at defendants' hotel; that, relying upon the promise of defendants, plaintiffs expended large amounts of money and incurred liabilities which remain unsatisfied, and which would not have been incurred but for such promise of defendants to pay said subscription.

The jury returned a verdict for the plaintiffs, and defendants appeal from the judgment entered thereon and from an order denying their motion for a new trial. The defense to the action will sufficiently appear from the discussion of the points made by defendants for reversal.

The statement on motion for a new trial specifies as errors several rulings admitting and excluding evidence, and giving and refusing to give certain instructions, and also specifies several particulars in which it is claimed the evidence is insufficient to justify the verdict. Appellants, however, do not discuss nor even allude directly to any of these specifications, but discuss the broad and material questions involved in the case, and to these we will direct our attention.

It is contended that the performance of gratuitous promises depends wholly upon the good will of the promisors, and will not be enforced at law unless the promisee has accepted and acted upon the same by incurring some obligation or expending money on the strength of it. (Citing *Cottage-Street Church v. Kendall*, 212 Mass. 528; 23 Am. Rep. 286.)

Accepting this as a correct statement of the law as applied to the facts of that case, no principle there stated is violated by the verdict and judgment in this case. By the terms of the subscription it was payable March 15th, while the grand parlor was not to be held until April 26th. Mr. Lasar testified, in substance, that before the meeting of the parlor the committee requested payment of defendants' said subscription; that defendants said they could not pay it at that time, but would pay on April 24th, that it was as good as cash, and to go ahead and make all their arrangements; that in making their preparations they took the amount of the subscriptions in the aggregate, and considered said subscriptions as cash and incurred obligations and expenses on the faith of it; that the amount of subscriptions collected was nineteen hundred and fourteen dollars and sixty cents, and the total amount expended for the entertainment was two thousand, five hundred and seven dollars and ninety-eight cents, leaving a deficiency of five hundred and ninety-three dollars and thirty-eight cents, and that after the grand parlor adjourned defendants refused to pay their subscription.

The request of the defendants to the committee to regard their subscription as cash and to go on and make all their arrangements, and the action of the committee in incurring obligations on the faith of this request, was a sufficient consideration to fix the liability of the defendants upon their subscription, and it is not necessary that such request should have been made at the time of the subscription.

In *Presbyterian Church v. Cooper*, 112 N. Y. 524, 8 Am. St. Rep. 767, it was said: "There is, we suppose, no doubt that a subscription, invalid at the time for want of consideration, may be made valid and binding by a consideration arising subsequently between the subscribers and the church or corporation for whose benefit it is made. Both of the cases cited (*Barnes*

v. Perine, 12 N. Y. 18, and *Roberts v. Cobb*, 103 N. Y. 600), as we understand them, were supported on this principle. There was, as held by the court in each of these cases, a subsequent request by the subscriber to the promisee to go on and render service or incur liabilities on the faith of the subscription, which request was complied with, and services were rendered or liabilities incurred pursuant thereto. It was as if the request was made at the very time of the subscription, followed by performance of the request of the promisor."

Another fact showing a consideration for the promise to pay the amount sued for appears in the evidence. The defendants were the proprietors of a large hotel. At the time the subscription was made the committee was considering the matter of giving a ball or banquet, or both, to the delegates to the grand parlor, and, defendants desiring it, it was agreed between the committee and the defendants at the time the subscription was made, or immediately thereafter, that if the ball and banquet were given one of them should be given at defendants' hotel, and in case neither were given at that hotel defendants' subscription should be reduced to two hundred and fifty dollars.

This agreement converted the subscription, which upon its face, was originally one to a charitable purpose simply, into a contract to pay to the committee the sum so subscribed upon condition that a ball or banquet should be given to the grand parlor at the defendants' hotel, and a ball was given at said hotel pursuant to this agreement. This was a good consideration for the promise to pay the full sum sued for, and it is, therefore, not necessary to consider whether the defendants' liability should be reduced to its proportion of the expense incurred in entertaining the grand parlor measured by the entire amount subscribed, the amount subscribed exceeding the expenditures by the sum of two hundred and forty-one dollars and fifty-two cents, but the amount of subscriptions collected being five hundred and ninety-three dollars and thirty-eight cents less than the amount expended."

Defendants objected to the introduction of any evidence on the part of the plaintiffs upon the ground that the complaint does not state a cause of action, and this objection to

the complaint was also repeated upon defendants' motion for a nonsuit where it was specified "that the plaintiffs sue as individuals, and seek to recover in an individual capacity as trustees of an express trust."

The subscription was, on its face, made payable "to the subscription committee of Los Osos Parlor," and the complaint alleges that the plaintiffs constituted said committee, and as such committee entertained said delegates, et cetera. Trustees of an express trust need not join the *cestuis que* trust as parties, though the title of the cause should state that they sue as trustees of the person or association for whom they are acting. If however, the body of the complaint shows that they are trustees of an express trust and for whom they are such trustees (*Spear v. Ward*, 20 Cal. 659, 676; *Wise v. Williams*, 72 Cal. 544, 547), it is sufficient; and these facts appear in the complaint. Besides, the objection should have been taken by demurrer, as the alleged defect appeared upon the face of the complaint.

Appellants' contended, however, that expenditures were made which did not come within the purview of this subscription for "entertainment," which, they say, is synonymous with "board," and includes the ordinary necessities of life. The distinction between entertaining a friend at one's home, or a hotelkeeper entertaining a traveler at his hotel, and entertaining a large number of strangers, constituting an organized body, by the residents and business men of the city, is quite apparent; and as to the latter what may be included in the entertainment of the visiting body is usually limited by the amount of money available for the purpose and the ingenuity of the entertainers in devising sources of enjoyment. I think the record does not show that any of the money was expended for purposes not fairly within the meaning and intent of the subscription paper in that regard.

It is also contended by appellants that all the expenses of the entertainment have been fully paid, and that, therefore, they are not liable. It is shown, however, that the deficiency of five hundred and ninety-three dollars and thirty-eight cents was met by borrowing that sum from one of the funds of Los Osos Parlor, which was not a fund intended to be used for the entertainment.

The supposed insufficiency of the evidence to justify the verdict appears to be based upon the alleged want of consideration for the promise, and has been sufficiently noticed. None of the alleged errors of law specified in the statement on motion for a new trial are noticed in appellants' brief, and we have not discovered any that would justify a reversal of the judgment or order.

I therefore advise that the judgment and order should be affirmed.

Cooper, C., and Britt, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are affirmed.

Van Dyke, J., Garoutte, J., Harrison, J.

[L. A. No. 571. Department One.—August 10, 1899.]

JOHN R. ELLIS et al., Respondents, v. ALECK RADEMACHER, Appellant, and Others, Defendants.

JUDGMENT UPON ADMISSIONS OF ANSWER—RELIEF MUST BE WARRANTED BY COMPLAINT.—In case of a judgment rendered upon an answer admitting all of the averments of the complaint, and presenting no issue, whether it is in effect the same as a judgment by default or not, the relief granted to the plaintiff cannot exceed that which the law awards as the legal conclusion from the facts alleged, or be inconsistent with the case made by the complaint.

ID.—COMPLAINT FOR SPECIFIC PERFORMANCE—IMPROPER RELIEF.—Under a complaint for the specific performance of a contract to convey a half interest in a mine in consideration of the building of a mill by plaintiff, and to work the mine upon equal shares, alleging interference by defendant with the performance of the contract by plaintiff, and his ejection of plaintiff from the mine, a judgment directing specific performance by the defendant, and not by the plaintiff, and enjoining the defendant from conveying any part of the mine, to anyone other than plaintiff, and from working the mine, without reference to any performance of the contract by the plaintiff, is improper, and grants relief inconsistent with the case made by the complaint.

1D.—JUDGMENT FOR CO-PLAINTIFF—INSUFFICIENT ALLEGATION.—A judgment in favor of a co-plaintiff is not authorized or sustained by an allegation that plaintiffs are informed and believe that such co-plaintiff has or claims to have some interest in the mining property.

1D.—INDEFINITE JUDGMENT—REFERENCE TO EXHIBIT OF CONTRACT.—A decree enforcing a contract should be definite as to the things to be performed by each of the parties, and as to the acts enjoined; and a decree enjoining a defendant from doing any act whatever which will in any way interfere with the rights of the plaintiff under an exhibit of the contract attached to the complaint, is too uncertain and indefinite to be enforced.

APPEAL from a judgment of the Superior Court of Kern County. J. W. Mahon, Judge.

The facts are stated in the opinion of the court.

T. M. Osmont, for Appellant.

W. W. Middlecoff, for Respondents.

COOPER, C.—This is an appeal from the judgment on the judgment-roll alone. The defendant Rademacher (appellant here) filed an answer, and by his answer admitted the allegations of the complaint and prayed that plaintiff might have judgment.

Findings were filed and judgment entered for respondents. The appellant claims that the findings and judgment are too broad and give to respondent more relief than is warranted by the complaint. It is well settled that a judgment by default cannot give any relief in excess of that demanded in the complaint. (Code Civ. Proc., sec. 580; *Raun v. Reynolds*, 11 Cal. 19; *Lamping v. Hyatt*, 27 Cal. 102.)

A default admits the material allegations of the complaint, and no more. It is not necessary to determine whether there is any difference in principle between a case where the allegations of the complaint are admitted by the legal effect of the silence of a party, and where such allegations are admitted by a written answer. In either case the relief given to the plaintiff cannot exceed that which the law awards as the legal conclusion from the facts alleged. The court cannot grant any relief in either case not war-

ranted by the averments of the complaint. (*Carpentier v. Brenham*, 50 Cal. 551; *Cummings v. Cummings*, 75 Cal. 441; *Hicks v. Murray*, 43 Cal. 522.) Our code (Code Civ. Proc., sec. 580) provides as follows: "The relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint; but, in any other case the court may grant him any relief consistent with the case made by the complaint and embraced within the issue."

It will be necessary, therefore, for us to determine whether in this case the relief granted was consistent with the complaint, as there were no issues made by the answer. The complaint alleges that on July 28, 1896, the appellant and respondent Ellis entered into a written contract by the terms of which the appellant agreed to sell and convey to said Ellis an undivided one-half of a certain mining claim known as the Baron mine, in consideration of the agreement of said Ellis to erect a quartz stamp mill on the nearest adjacent millsite where water can be obtained, the said mill to be erected within six months from the time that the water can be procured at some near and suitable place, the appellant reserving the surface ground upon which his cabin stands. The proceeds from the mining and milling of ores were to be equally divided. Each party was to have equal voice in determining whether or not the milling capacity of the mill so erected shall be increased. Respondent Ellis further agreed to use his best endeavors immediately to secure a sufficient water supply as near said mine as possible. The complaint further alleges that the appellant interfered with and prevented respondent Ellis from performing said contract on his part, and from prospecting for water on said claim, and from taking ores therefrom, and from entering thereon for the purpose of erecting a mill, and that appellant ousted and ejected the respondent Ellis from said claim. The prayer of the complaint is for a specific performance of the contract, and that defendants be enjoined from digging up and carrying away ores, and from interfering with plaintiff's rights, and that appellant Rademacher be enjoined from conveying the mine to any one other than respondent Ellis, and for general relief. The decree entered grants more relief to respondents than is authorized by the complaint in several respects. It directs appellant to specifically perform the con-

tract while it does not so direct the respondent Ellis, and fixes no time within which the respondent Ellis is to erect the quartz mill or perform the conditions of said contract on his part. It makes it the duty of the appellant absolutely to perform the contract without any reference to the payment of the consideration by the respondent Ellis by performing the covenants of said contract on his part to be performed. It perpetually enjoins the appellant from conveying the said mine or any part thereof to anyone other than the respondent Ellis. The injunction not only prevents the appellant from selling and conveying the undivided one-half of said mine, which under the terms of the contract he was to convey to respondent Ellis, but it absolutely prevents the appellant from conveying any part of the mine to anyone other than respondents, and this without any regard to the question as to whether or not respondent Ellis ever complies with the contract on his part. It enjoins the appellant forever from digging up or carrying away any ore or gold on said premises, with no condition as to whether or not the respondent Ellis shall comply with the said contract on his part. The decree in the respects pointed out is erroneous and grants relief beyond that authorized by complaint. The appellant has the right to have respondent Ellis proceed with reasonable diligence and in a reasonable time to erect the said quartz mill as provided in said contract. The time fixed by the said contract for the erection of said mill is six months from the time that water can be procured at some near and suitable place. The respondent Ellis should use reasonable diligence and within a reasonable time to procure water, and, if he shall fail to do so, the consideration will have failed and the appellant will not longer be bound by the contract.

The decree as entered is in favor of Downing, one of the plaintiffs, and the only allegation of the complaint as to him is that plaintiffs (of whom Downing is one) are informed and believe that plaintiff Downing has or claims to have some interest in said mining property. The complaint therefore, did not authorize any judgment in favor of plaintiff Downing. The contract is set forth in the complaint as "Exhibit A," and the decree enjoins the appellant "from doing any act whatever which will in any manner interfere

with the rights of the plaintiffs under said Exhibit A." The decree should be definite as to the things to be performed and as to the acts enjoined. To enjoin the appellant from doing any act which will in any manner interfere with the plaintiffs' rights under a certain contract is too uncertain and indefinite to ever be enforced. The appellant is entitled to have the decree define his rights as well as the rights of the respondents, and to have it direct what specific acts appellant is to do, as well as what he is not to do. The decree should be definite and certain, and grant no greater relief than that authorized by the complaint. It should fix and define a time within which respondent Ellis shall be required to build the quartz mill upon the premises. We think the judgment should be reversed, and that the cause should be remanded with instructions to the court below to render its judgment and decree in accordance with this opinion and as authorized by the allegations of the complaint.

Britt, C., and Haynes, C., concurred.

For the reasons given in the foregoing opinion the judgment is reversed and the cause remanded, with instructions to the court below to render its judgment and decree in accordance with this opinion and as authorized by the allegations of the complaint. Van Dyke, J., Garoutte, J., Harrison, J.

[Crim. No. 527. Department One—August 10, 1899.]

THE PEOPLE, Respondent, v. AUGUST NEBER, Appellant.

CRIMINAL LAW—CHARGE TO JURY—CONDITIONS AND LIMITATIONS.—Each sentence of a charge to the jury in a criminal case need not contain all the conditions and limitations to be gathered from the entire text.

Id.—BURGLARY—CHARGE AS TO POSSESSION OF STOLEN PROPERTY—MATTER OF FACT.—A charge to the jury upon the trial of an accusation of burglary with intent to commit larceny, in reference to the possession of stolen goods, which at the outset showed that it was based hypothetically upon the fact of such possession being established beyond a reasonable doubt, does not proceed to charge the jury upon matters of fact, because such hypothesis is not repeated in

the subsequent discussion of the effect of evidence of such possession, and as to when it is to be considered as a circumstance in connection with other circumstances in the case in arriving at a verdict.

ID.—CAUTION TO JURY.—Such charge could not mislead the jury when they were in a subsequent part of the charge expressly cautioned against understanding the court as intimating any opinion upon any fact in the case, or upon the weight of the evidence.

APPEAL from a judgment of the Superior Court of Napa County. E. D. Ham, Judge.

The facts are stated in the opinion.

Webber & Rutherford, for Appellant.

Tirey L. Ford, Attorney General, and A. A. Moore, Jr., Deputy Attorney General, for Respondent.

BRITT, C.—Defendant was convicted in this action of the crime of burglary in the second degree, perpetrated by entering a certain building with intent to commit larceny therein. The charge of the judge to the jury at the trial included the following matter: "The mere fact that a person is found in the possession of property recently stolen, if such be the fact, and established by the evidence beyond a reasonable doubt, is not in and of itself sufficient to warrant a conviction of the party either of larceny or burglary. There must be evidence outside of, or beyond or independent of, the fact of the possession of the property recently stolen in order to warrant a jury in convicting a party. But where the evidence establishes the fact beyond a reasonable doubt that the person who had the recent possession of stolen property gives false, contradictory, or inconsistent accounts of how he came by that possession, that is a circumstance that the jury should consider in arriving at a verdict, and they can and should consider the fact that the party has the possession of property recently stolen in connection with all the other circumstances in the case in arriving at their verdict. On appeal, defendant does not deny that there was evidence before the jury tending to show that certain personal property was stolen from the building aforesaid at or about the

time of the burglary alleged against him, and was found soon afterward in his possession; but he contends that the effect of said instruction was to say that those things were established as true, and so the court charged the jury as to matter of fact.

At the outset of the instruction complained of the judge stated the condition upon which his remarks were founded to be hypothetical only—"if such be the fact, and established beyond a reasonable doubt." It is incredible that the jury, as men of ordinary intelligence, did not understand that the same qualification accompanied the immediately succeeding references to the same circumstance, although the condition was not repeated. Each sentence of the charge is not required to contain "all the conditions and limitations which are to be gathered from the entire text." (*People v. Doyell*, 48 Cal. 85; *People v. Flynn*, 73 Cal 511; *People v. Worden*, 113 Cal. 569.) If a suspicion remain that the jury might have misunderstood the language of the court, it is removed by the part of the charge subsequently occurring, as follows: "Do not understand me as intimating any opinion on any fact in this case. Whether the defendant is guilty or innocent of this offense is for you to determine from the evidence. You must distinctly understand that the court in no manner or form is expressing or intends to express or intimate any opinion upon the weight of the evidence, . . . or that any fact in the case is or is not proven."

Other points made by appellant are without merit, and are not of importance to require separate notice. The judgment should be affirmed.

Cooper, C., and Haynes, C., concurred.

For the reasons given in the foregoing opinion the judgment is affirmed.

Van Dyke, J., Garoutte, J., Harrison, J.

[L. A. No. 467. Department One.—August 10, 1899.]

R. E. JACK, Respondent, v. SINSHEIMER, Appellant.

LEASE—EVICTION FOR NONPAYMENT OF RENT—LIQUIDATED DAMAGES—

VOID CLAUSE.—Under a provision in a lease for five years that, upon failure of the lessee to pay the stipulated rent, he shall vacate the premises upon receiving thirty days' notice from the lessor, it is not difficult or impracticable to fix the amount of damage resulting to the lessor, and an additional clause providing that the lessee, in such case, shall pay to the lessor "the sum of one thousand dollars, as settled and liquidated damages," is void, under sections 1670 and 1671 of the Civil Code.

ID.—GUARANTY OF VOID PENALTY—LIABILITY OF GUARANTOR.—A guarantor is never implicated beyond the strict terms of his contract; and a guaranty which by its terms purports to secure the payment of a penalty of one thousand dollars which by the lease was fixed as liquidated damages, in case the lessee should be evicted from the premises for nonpayment of rent, or should voluntarily vacate the same, is void on account of the invalidity of the penalty, and cannot subject the guarantor to any liability for rent, or for any actual damages and expenses accruing to the mortgagee by reason of the

ID.—VOID MORTGAGE TO SECURE GUARANTOR—QUIETING TITLE.—A mortgage made by the lessee to secure the guarantor against all cost, damages and expenses accruing to the mortgagee by reason of the guaranty of the void penalty contained in the lease, is void, and is no defense to an action to quiet title by the successor in interest of the mortgagor.

ID.—INSUFFICIENT ANSWER—LIABILITY OF GUARANTOR NOT SHOWN.—An answer by such mortgagee in the action to quiet title, which does not aver that by reason of the eviction of the lessee the lessor suffered any damage, and which does not show that the lessee was evicted or voluntarily vacated the premises, during the term of the lease, is to be construed most strongly against the pleader, and does not disclose any liability of the guarantor, within the terms of his contract, or show that the mortgage of the lessee to the guarantor constitutes any lien upon the mortgaged premises.

APPEAL from a judgment of the Superior Court of San Louis Obispo County. E. P. Unangst, Judge.

The facts are stated in the opinion.

Wilcoxon & Bouldin, and J. M. Wilcoxon, for Appellant.

W. H. Spencer, for Respondent.

COOPER, C.—This is an action brought by plaintiff to quiet his title to a certain tract of land described in the complaint. The defendant answered, and in his answer set forth a certain mortgage made by one Cheda, which mortgage was claimed to be a valid lien upon the premises in favor of defendant. The plaintiff demurred to the answer upon the ground that the facts therein stated did not constitute any defense to the action; the demurrer was sustained, and, defendant declining to amend, judgment was rendered against him. This appeal is by defendant from the judgment and for the purpose of reviewing the order sustaining the demurrer. It appears from the answer that on June 19, 1891, one Andrews, as lessor, leased to one Cheda, as lessee, certain premises in San Luis Obispo county for the period of five years from and after October 1, 1891, at an annual rental of two thousand dollars, one-third of the annual rent payable every four months in advance. This lease contained the following covenant:

“And the said party of the second part (Cheda) does hereby covenant, promise, and agree to pay to said party of the first part (Andrews) the said rent, in the manner hereinbefore specified, . . . and, upon his failure to pay said rent, he shall vacate said premises upon receiving thirty days’ notice from the party of the first part, and shall pay to him the sum of one thousand dollars, as settled and liquidated damages.”

At the time of making the said lease the defendant signed an indorsement thereon in the following language:

“In consideration of the making of the foregoing lease or agreement, and for the purpose of securing the penalty of one thousand dollars therein provided for, I hereby guarantee the payment of one thousand dollars unto said Truman Andrews, whenever, at any time during the term therein limited and provided for, the said J. A. Cheda shall be legally evicted from said premises for nonpayment of rent therein provided for, or whenever he voluntarily vacates the same, upon ten days’ notice.

“Dated June 19, 1891.

“B. SINSHEIMER.”

On January 25, 1894, the said Cheda was the owner in fee of the property described in the complaint in this action,

and while such owner, on said last-named day, he made to the defendant a mortgage thereon, which mortgage was duly acknowledged and recorded, and which was given for the purpose of securing defendant "against all cost, damages, and expenses incurred, suffered, or accruing to said mortgage by reason of a certain written guaranty made by him upon the part of and for said J. A. Cheda, upon and about a certain lease this day executed between Truman Andrews and J. A. Cheda, to which lease reference is hereby made." On September 1, 1896, the said Cheda was in default for rent under the terms of said lease, and thereupon proceedings were commenced to evict and eject him from the leased premises. Afterward, judgment was duly given and made against said Cheda and he was legally evicted from the said premises, and he has never paid the rent so due or the said one thousand dollars. Notice of the nonpayment of rent and of the default of Cheda was given to defendant and demand made upon him for the payment thereof. Defendant has not paid the same, but claims that he has a right to the security given by the mortgage until he is fully released from said guaranty. The principal question in this case is as to whether or not the clause in the lease fixing the sum of one thousand dollars as liquidated damages in case of the premises being vacated by the lessee is void. The rule that a guarantor is never implicated beyond the strict terms of his contract must be applied to defendant in this case. His guaranty was "for the purpose of securing the penalty of one thousand dollars . . . whenever at any time during the term therein limited and provided for the said J. A. Cheda shall be legally evicted from said premises for nonpayment of rent, or whenever he voluntarily vacates the same. "The guaranty was therefore by its terms to secure a penalty of one thousand dollars which by the lease was fixed as liquidated damages in case the lessee should be evicted from the said premises or voluntarily vacate the same. The provisions of our code are as follows: "Every contract by which the amount of damage to be paid, or other compensation to be made, for a breach of an obligation, is determined in anticipation thereof, is to that extent void, except as expressly provided in the next section." (Civ. Code, sec. 1670.) "The parties to a contract may agree therein upon an amount

which shall be presumed to be the amount of damage sustained by a breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage." (Civ. Code, sec. 1671.)

We think, under the provisions of the code quoted, that clause of the lease as to the penalty of one thousand dollars is void. It does not occur to us that upon the failure of a tenant to pay rent, and upon his eviction after notice and demand, the actual damage would be extremely difficult to fix or impracticable of estimation. It is provided in our code (Code Civ. Proc., sec. 1174) that in summary proceedings for obtaining possession of real property after default of the tenant in the payment of rent, the judgment or verdict shall find the amount of damages occasioned to the plaintiff and for the amount of rent due, and shall be rendered against the defendant for three times the amount so found. If the lessor had brought an action against the lessee under the above section and preceding sections of the Code of Civil Procedure, the rule laid down in section 1174 would be applicable. We not only have a rule laid down in the Code of Civil Procedure, section 1174, for the wrongful holding over of a tenant after failure to pay rent, but we have rules laid down in Civil Code, sections 3335, 3344, and 3345, and finally we have the rule laid down in the Civil Code, section 3334, that, with the exceptions of the rules stated in the Code of Civil Procedure, section 1173, and the Civil Code, sections 3335, 3344, and 3345, the detriment caused by the wrongful occupation of real property is deemed to be the value of the use of the property for the time of such occupation and the costs, if any, of recovering the possession. The above sections seems to provide rules for ascertaining the damage in all kinds of actions for the recovery of real estate. When a tenant fails to pay rent as provided in the lease, the amount of damage is not extremely difficult to fix, and it certainly is not impracticable to fix the amount of such damage. In *Patent Brick Co. v. Moore*, 75 Cal. 205, it was held that a stipulation by the contractor in a building contract to pay the owner a specified amount as liquidated damages for each day's delay in completing the building is not sufficient evidence of itself to entitle the owner to recover the amount stipulated for as liquidated damages.

In *Drew v. Pedlar*, 87 Cal. 443, 22 Am. St. Rep. 257, it was held that where a written agreement was made between a vendor and purchaser for the sale of certain real estate and one thousand dollars was paid down by the purchaser, and the contract contained a provision that in case of a breach thereof by the purchaser the thousand dollars should be taken by the vendee as liquidated damages, that the provision was void. In the opinion it is said: "It appears, from the nature of the contract under consideration, that it would not be impracticable or at all difficult to fix the actual damage in this case, since section 3307 of the Civil Code provides a rule by which the damage, in all cases of this kind, may be measured and definitely fixed."

In *Pacific Factor Co. v. Adler*, 90 Cal. 110, Am. St. Rep. 102, a contract had been entered into between plaintiff and defendant for the delivery of a large number of grain bags. The contract contained a clause to the effect that the defendant would pay to plaintiff three cents for each bag which he refused or neglected to deliver, and also contained the express agreement that it was understood between the plaintiff and defendant that owing to the nature of the case it would be impracticable and extremely difficult to fix the actual damage. It was held that, notwithstanding the provision in the contract that the parties understood that it would be impracticable and extremely difficult to fix the actual damage, the provision was void under sections 1670 and 1671 of the Civil Code.

In *Wilmington Trans. Co. v. O'Neil*, 98 Cal 1, the contract sued upon contained a provision for the hiring of a lighter and for the payment of a fixed sum in case of loss or irreparable damage to the lighter. It was held that the stipulation was in the nature of a penalty, and that the plaintiff in suing upon the contract should have alleged and proved actual damage.

Applying the rule as laid down in the above cases, the stipulation in the lease as to one thousand dollars' penalty was void and the demurrer properly sustained. It is said by appellant that even if the penalty is void as to the amount, the stipulation is binding upon the lessee for the actual damage. This would be true without any such provision in the lease. In case the lessee failed to pay rent or vacate before the end of his lease he is liable to his lessor for the actual damage

sustained without any covenant to that effect or any bond or guaranty. That, however, is not this case. The defendant did not guarantee the rent nor agree that under any circumstances he would be responsible for it. He guaranteed the penalty of one thousand dollars in case the lessee was legally evicted for nonpayment of rent or voluntarily vacated the premises. The penalty being void, the guarantor is not liable. It is alleged in the answer that Cheda became indebted for rent under said lease, but no statement is made as to whom he so became indebted. It is stated that Cheda was legally evicted from the leased premises for nonpayment or rent, but it is not alleged that by reason of such eviction the lessor or anyone else suffered any damage. The answer may be true, and yet the lessor may have been greatly benefited by evicting the lessee, as he may have leased the premises immediately for a much greater rent, or otherwise received profit by obtaining possession thereof.

In the case of *Pacific Factor Co v. Adler*, *supra*, the plaintiff introduced in evidence its contract containing the provision that defendant would pay to plaintiff three cents for each bag which he refused or neglected to deliver under the contract, and, after showing the number of bags which defendant failed to deliver, rested without any proof of damage. Defendant moved in the court below for nonsuit upon the ground, among others, that no proof of actual damage was offered. The nonsuit was granted and this court affirmed the judgment.

The guaranty as to the penalty only made defendant liable in case, during the term of the lease, the lessee should be legally evicted from the said premises for nonpayment of rent, or should voluntarily vacate the same. There is no allegation in the answer that the lessee ever voluntarily vacated the premises, and no allegation that he was legally evicted during the term of the lease. The rule that a pleading will be construed most strongly against the pleader must be applied to the answer in this case. Tested by the demurrer the statements of the answer must be taken as true, yet, for the purpose of holding the guaranty of defendant binding, we cannot presume any facts outside of those stated in the answer.

We advise that the judgment be affirmed.

Haynes, C., and Britt, C., concurred.

For the reasons given in the foregoing opinion the judgment is affirmed. Van Dyke, J., Garoutte, J. Harrison, J.

[L. A. No. 541. Department One.—August 11, 1899.]

REDLANDS HOTEL ASSOCIATION, Appellant, v. J. R. RICHARDS et al., Respondents.

CHattel Mortgages—Foreclosure of Second Mortgage—Value of Property—Power of Commissioner.—A commissioner appointed to make sale of chattels under a decree of foreclosure of a second chattel mortgage thereupon, is clothed with executive powers only, and cannot judicially determine that the property is not of sufficient value to meet the prior mortgage, nor certify a deficiency without having made sale of the property as directed.

Id.—Return Without Sale—Deficiency Judgment Vacated—Execution Quashed.—The return by the commissioner without sale cannot warrant the docketing of a deficiency judgment; and a judgment so docketed, upon which execution is issued, is properly vacated by the court, and the execution quashed.

Id.—Power of Court—Case Considered.—It seems that under the equitable construction given to the statute in *Toby v. Oregon etc. Co.*, 98 Cal. 490, the court may have the power, upon proper proof that the mortgage was valueless, on account of the insufficiency of the property to pay and discharge the prior mortgage, to find that fact and direct a deficiency or personal judgment against the defendant without selling the mortgaged property.

APPEAL from an order of the Superior Court of San Bernardino County, vacating a deficiency judgment and quashing an execution issued thereupon. John L. Campbell, Judge.

The facts are stated in the opinion.

Frank C. Prescott, for Appellant.

L. H. Valentine, for Respondents.

HAYNES, C.—The Redlands Hotel Association, a corporation, brought an action to foreclose a chattel mortgage made by Richards upon certain hotel furniture to secure a

promissory note made by him and one David Weh to the plaintiff, and indorsed before delivery by John M. Jones (both of whom were made defendants), and which, as was alleged in the complaint, was subject to a prior mortgage made by Richards to said Jones upon the same furniture. The court found for the plaintiff, and entered judgment directing the sale of said property to pay the amount found due to the plaintiff and appointed a commissioner to make such sale; but further found and decreed that all of the mortgaged property was subject to a first and prior chattel mortgage given by defendant Richards to defendant Jones. It also provided that if the proceeds should not be sufficient to satisfy the amount found due to the plaintiff, the deficiency should be docketed against all the defendants.

An order of sale was issued to the commissioner on November 29, 1897, and on December 1st he made a return thereon to the effect that he made an attempt to levy on the property described in the order of sale for the purpose of selling the same, but found that it was subject to a prior mortgage found in the decree to be a prior lien upon the property directed to be sold; that the amount secured by said prior mortgage exceeded the value of the property, and if sold would not pay the first chattel mortgage; that he was unable to take possession of the property for lack of the necessary money to pay the lien of the first mortgage, and therewith returned said writ wholly unsatisfied, and certified the deficiency to be eight hundred and seventy dollars and twenty-three cents; and for said sum a deficiency judgment was thereupon docketed against all the defendants. Afterward, an execution was issued upon said deficiency judgment and levied upon other property of defendant Richards, who thereupon procured an order against the plaintiff to show cause why said deficiency judgment should not be vacated and said execution quashed. The application was heard upon affidavits setting out the foregoing and other facts, and upon the files and records in said cause, and upon the hearing an order was made quashing the execution and vacating the deficiency judgment, and from that order the plaintiff appeals.

The affidavits, so far as they relate to the value of the mortgaged property, are conflicting; that of defendant Richards alleging upon information and belief that plaintiff's mort-

gage is not valueless as a security, but that if a sale had been made "some money could have been realized from such sale to apply" upon plaintiff's judgment; while the affidavit on behalf of plaintiff is to the effect that the mortgaged property is not worth two thousand dollars (the amount of the prior mortgage), and would not bring said sum either at private sale or a sale under execution.

The commissioner appointed to make the sale of the mortgaged property under the decree of foreclosure was clothed with executive powers only, and could not judicially determine the value of the property, or that the plaintiff was entitled to a deficiency judgment, otherwise than by a sale of the property as directed.

Toby v. Oregon etc. Co., 98 Cal. 490, cited by appellant, is not in point. In that case a receiver was appointed *pendente lite*, and after trial and order for judgment, upon a showing to the court that the property was deteriorating in value, and large expense in keeping was being incurred, the receiver was ordered by the court to sell the mortgaged vessel as perishable property. It is true it was there said: "The contention of appellant that there can be no deficiency judgment without a sale and formal return by the sheriff seems to me too technical to give effect to the evident intent of the law-makers in many cases. Suppose in the present case the steamship mortgaged had been lost by the perils of the sea, *pendente lite*, would the plaintiff have been without remedy? Or can it be claimed that the court would have been forced to the useless expedient of foreclosing the mortgage, ordering a sale, and awaiting the return of the sheriff, before a deficiency judgment could be docketed? Would it not rather be said that the court having obtained jurisdiction of the parties and of the subject matter would, under the rules of equity, proceed under the altered circumstances, and, in view of the fact that the security was exhausted, to do justice by the entry of judgment for what would then become the deficiency, viz., the full amount due?"

Under the equitable construction thus given to the statute, it may be that the court, upon proper proof that plaintiff's mortgage was valueless because the property was insufficient to pay and discharge the prior mortgage, could have found

that fact and directed a deficiency or personal judgment against the defendants, without selling the mortgaged property; but it must be apparent from the reasoning of that case that the commissioner had no such power, and that the deficiency judgment based upon his returns was wholly unauthorized, and the writ of execution issued thereon must fall with it.

What course the plaintiff should have pursued, or what remedy it may have in the present situation, are moot questions upon which no opinion is expressed.

I advise that the order appealed from be affirmed.

Gray, C., and Cooper, C., concurred.

For the reasons given in the foregoing opinion the order appealed from is affirmed.

Harrison, J., Garoutte, J., Van Dyke, J.

[L. A. No. 551. Department One.—August 12, 1899.]

N. S. NILES et al., Appellants, v. CITY OF LOS ANGELES et al., Respondents.

DEDICATION OF STREET—INTENTION ESSENTIAL—INSUFFICIENT FINDINGS—PROBATIVE FACTS—USER OF WAY—LICENSE.—The intention of the owner of land to dedicate part thereof as a public street is essential to a dedication; and findings of mere probative facts, without the finding of a dedication or of an intent to dedicate, and which are not inconsistent with the absence of such intention, and may indicate a mere license to the public to use an open passageway for travel, without adverse user thereof by the public, are insufficient to establish the dedication of the way as a public street.

ID.—GENERAL FINDING.—A general finding that the way was a public street, placed among the conclusions of law, and evidently intended as a deduction from previous probative facts found, cannot prevail, if not sustained by the probative facts.

ID.—ADVERSE USER BY PUBLIC.—Where the dedication of a highway is sought to be established by user by the public, it must be shown that the user was adverse with the knowledge of the owner; and the user must be of such duration that the public interest and private right would be materially impaired if the dedication were revoked and the use by the public discontinued.

ID.—MAKING AND FILING OF MAP—OFFER OF DEDICATION—ACCEPTANCE—REVOCATION.—The making and filing of a map designating certain streets thereon, is only an offer to dedicate such streets to the public, and unless the offer is accepted by the public within a reasonable time, the owner may resume possession and control of the property, and thereby revoke his offer.

ID.—INSUFFICIENCY OF EVIDENCE.—Evidence showing that since the opening by adjoining owners of a strip used as a passageway, it was cultivated by the owners almost every year, that fruit and other trees were placed thereon by them, that taxes were paid by them to the city upon the land, that on an assessment map of another street the strip was shown to be private land, and not a street, and was assessed to the owners thereof, and that the strip had never been improved, graded or accepted as a street by the public authorities, is wholly insufficient to support a finding that the strip was dedicated or abandoned to the public as a street.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order denying a new trial. J. W. McKinley, Judge, rendering judgment. M. T. Allen, Judge, denying new trial.

The facts are stated in the opinion.

M. W. Conkling, for Appellants.

W. E. Dunn, for Respondents.

COOPER, C.—This action was brought by appellants to restrain the respondents from entering upon, taking possession of, and removing trees, fences, and improvements from the real estate described in the complaint. The respondents in their answer claimed that a certain part of the land described in the complaint, about thirty feet wide off the eastern side thereof running north and south, bounded on the northern end by Washington street, on the south by Parcel's subdivision of the John Thomas tract, and on the east by a line formerly the west line of the lands of Reed and Snodgrass, constituted a part of a public street, to wit, Trinity street, in the city of Los Angeles.

Findings were filed and judgment rendered in favor of the respondents as to the lands described in the answer. A motion was made for a new trial and denied, and this appeal is from the judgment and order. The findings and conclusions of the lower court were as follows:

"1. That in the year 1887 the plaintiff, William Niles, was the owner of a certain tract of land in said city of Los Angeles, including the strip of land in question in this action, which tract fronted on Washington street on the north, adjoining the John Thomas subdivision of the Parcel's tract on the south, and adjoining a tract of land belonging to one L. Snodgrass on the east.

"2. That in 1887, at a time when said William Niles and said Snodgrass were the owners respectively of said adjoining tracts of land, said Niles caused a fence to be built across his said tract of land running from Washington street to the south line of his said tract and on a line parallel with and thirty feet distant from the division line between the lands of Niles and Snodgrass, and at the same time said Snodgrass fenced his said tract of land, leaving outside of his said fence a strip of land about thirty feet in width adjoining for its full length said thirty foot strip which said Niles had left outside of his said fence; and that said two strips of land, having a total width of about sixty feet, were at said time thrown open to public travel by said Niles and Snodgrass, and have been ever since, until a few months prior to the bringing of this action, open to public travel without protest from plaintiffs or their predecessors in interest.

"3. That the strip of land, sixty feet in width and composed of the two thirty foot strips aforesaid, was in direct line with Trinity street, in said city, as it then existed, and as it now exists south of said tract of Niles and Snodgrass, and said sixty foot strip extends from Washington street south in direct continuation of said Trinity street.

"4. That ever since the building of said fences, in 1887, said sixty foot strip of land, including the land in question in this action, has been and was continuously used and traveled by the public as a public street of said city until obstructing fences were built by the plaintiff across the same a few months before the bringing of this action, and was during said time known as and called 'Trinity street.'

"5. That subsequent to the building of said fences, in 1887, William Niles made a conveyance of his said tract of land, and including the strip in question, to the plaintiff, N. S. Niles, and thereafter, to wit, on August 6, 1894, the said

N. S. Niles caused a survey of said property to be made and a map thereof to be recorded in the office of the county recorder of said Los Angeles county, on which map her said property is shown subdivided into lots and blocks only up to the line of said fence theretofore erected by said William Niles in 1887, the easterly line of said subdivision, as shown by said map, being substantially on the same line as the said fence.

"And as conclusions of law from the foregoing facts the court finds and decides: "1. That the land described in the complaint herein is a part of a public street of the city of Los Angeles, to wit, Trinity street; 2. That the restraining order, heretofore granted herein, should be dissolved; 3. That plaintiffs should take nothing by their said action, and that defendants recover their costs herein."

It is contended that the evidence does not sustain the findings, and that the findings do not justify the conclusions of law, and we think both contentions will have to be sustained. The stipulation contained in the statement on motion for a new trial shows that William Niles and John B. Niles owned the property described in the complaint in fee simple in the year 1880, and continued to so own it until February 4, 1888, when they conveyed it to the appellant, N. S. Niles. Findings 1 and 2, to the extent that they find that William Niles was the owner of the land in controversy in the year 1887, are therefore, not supported by the evidence and in direct conflict with the stipulation of the parties as shown by the record. The acts of William Niles tending to show a dedication in the year 1887, and prior to February 4, 1888, at a time when he was not the sole owner of the land, in so far as they would or could in any way affect the rights of this appellant, N. S. Niles, cannot be considered in this case. We then have the findings remaining, to the effect that since 1887 until within a few months prior to the commencement of this action the land described in the answer has been open to public travel without protest from appellants, and has been continuously used and traveled by the public as a public street until a few months before bringing this action, and that on August 6, 1894, the appellant N. S. Niles made a survey and map of the portion of the property described in the complaint other than that claimed in the answer to be a

street, and said map showed lots and blocks up to the portion so claimed to be a street in said answer, said portion not being on the said map. There is no finding of dedication and no finding that the land in controversy is a public street, and we do not think the findings of the probative facts herein stated are sufficient of themselves to show the premises to be a public street. It is not found that the public, during the times it has traveled over the said land, claimed any right to so travel over it, or that appellants even knew of such travel. There is no finding that the public authorities of the city ever claimed the said land as a public street, or that they ever expended any money in improving or grading the same. The finding that the appellants caused a map to be made and filed of other land up to a fence along the west line of the strip in controversy is of little consequence. It is not claimed that the land in dispute was shown or platted on said map as a street, or that the map even included it. The title to the land is in appellant N. S. Niles, unless by clear and unequivocal acts she or her predecessors in interest have dedicated it to the public. The law does not allow the land of a private owner to be taken for public purposes without any conveyance or consideration, except upon proof of such facts and circumstances as clearly show an intention on the part of the owner to abandon or dedicate the land to the public. Section 2618 of our Political Code defines public highways as follows: "In all counties of this state highways are roads, streets, alleys, lanes, courts, places, trails, and bridges laid out or erected as such by the public or, if laid out or erected by others, dedicated or abandoned to the public, or made such in actions for the partition of real property."

There is no pretense that the land claimed to be a street was ever laid out or erected by the public, or that it was made such in any action for partition of real estate. It follows that it cannot be held to be a public street unless it has "been dedicated or abandoned" to the public by the owner of the land. In the early and leading cases on the question of dedication in this state it is said: "The vital principle of the dedication is the intention to dedicate; and whenever this is unequivocally manifested, the dedication, so far as the owner of the soil is concerned, has been made. Time, there-

fore, though often a material ingredient in the evidence, is not an indispensable ingredient in the act of dedication. If accepted and used by the public in the manner intended, the dedication is complete—precluding the owner, and all claiming in his right, from asserting any ownership inconsistent with such use. Dedication, therefore, is a conclusion of fact, to be drawn by the jury from the circumstances of each particular case; the whole question, as against the owner of the soil, being whether there is sufficient evidence of an intention on his part to dedicate the land to the public use as highway." (*Harding v. Jasper*, 14 Cal. 648.)

To constitute a dedication of land to the public two things are necessary, to wit, an intention by the owner, clearly indicated by his words or acts, to dedicate the land to public use, and an acceptance by the public of the dedication. (Elliott on Roads and Streets, 85; *San Francisco v. Canavan*, 42 Cal. 553; *San Francisco v. Calderwood*, 31 Cal. 585; 91 Am. Dec. 542; *People v. Reed*, 81 Cal. 70; 15 Am. St. Rep. 22; Washburn on Easements, 140, 239; *Child v. Chappell*, 9 N. Y. 246.)

This use must be of such duration that the public interest and private right would be materially impaired if the dedication were revoked and the use by the public discontinued. (*Cincinnati v. White*, 6 Pet. 431, 439; *San Francisco v. Canavan*, *supra*.)

The making and filing a map designating certain streets thereon is only an offer to dedicate such streets to the public, and the dedication does not become effectual and irrevocable until the same is accepted by the public. (*People v. Williams*, 64 Cal. 502; *Hayward v. Manzer*, 70 Cal. 476; *People v. Reed*, 81 Cal. 77; 15 Am. St. Rep. 22.)

Such acceptance must be within a reasonable time after offer of dedication, and, if not accepted, the owner may resume the possession of the property and thereby revoke his offer. (*Hayward v. Manzer*, *supra*; *State v. Trask*, 6 Vt. 355; 27 Am. Dec. 554; *Field v. Manchester*, 32 Mich. 279; *County of Wayne v. Muller*, 31 Mich. 447; *People v. Reed*, *supra*.)

The finding that the strip of land was traveled and used by the public since 1887 without protest from appellants or their predecessors in interest is only the finding of probative facts tending to prove dedication, but the fact of dedication not necessarily follow from such probative facts, as they are not necessarily inconsistent with a total absence of intention to dedicate and may indicate a mere license. (*Cooper v. Monterey Co.*, 104 Cal. 438.)

Dedication is never presumed without evidence of unequivocal intention on the part of the owner. (*Quinn v. Anderson*, 70 Cal. 456.)

Where the dedication of a highway is sought to be established by user it must be shown that the user was adverse (*Huffman v. Hall*, 102 Cal. 30), and with the knowledge of the owner (*Hope v. Barnett*, 78 Cal. 14), and in this case there is no finding that the use was adverse or with the knowledge of the owner. It is claimed that under the portion of the findings termed "conclusions of law" the fact is found that the disputed premises are a public street. It has been held in many cases, in which the appellant sought to overthrow a judgment because of the absence of a finding, that a misplaced finding of fact placed in the conclusions of law be considered to prevent the reversal of a case fairly tried to prevent the setting aside of a judgment justly given. But in this case we have the finding of specific facts under five different headings, and finally "And as conclusions of law from the foregoing facts the court finds and decides: 1. That the land described in the complaint herein is a part of a public street of the city of Los Angeles, to wit, Trinity street." It is plain that this is a general statement or conclusion drawn by the court from the facts previously found. The rule in such cases is that the general finding cannot stand unless the specific facts previously found support it. (*People v. Reed*, *supra*; *Geer v. Sibley*, 83 Cal. 4; *Savings etc. Soc. v. Burnett*, 106 Cal. 540.)

As this case must be sent back for a new trial, it may be well for us to indicate our opinion on the evidence without regard to the findings. Conceding that William Niles was the sole owner of the land in 1887, at the time of the acts set forth in findings 1 and 2, and conceding that the court

found the facts of dedication and that the premises are a public street, we do not think the evidence would be sufficient to support the findings. William Niles testified that the fence was moved back, leaving the strip in contest open during his absence in the east, and that since the fence was removed the ground has been cultivated each year. That there are orange, pear, fig, and eucalyptus trees on the strip. That taxes have been paid to the city upon the land for the years 1891, 1892, 1893, 1894, 1895, and 1896. The witness Snodgrass, who owned the land immediately east of the strip in dispute in 1887 testified that he and William Niles talked it over between themselves and agreed to leave open strip sixty feet wide, being thirty feet off the side of the land of each, for a passageway, and that it was so left for a passageway. That it was not left for a street, and there was never any agreement to give the land for a street. That after the fences were set back Niles continued to farm his land right up to the line, and that witness always paid taxes on his; that the city never exempted it from taxes and never curbed or graded it, and claimed that it was not a street. No witness testified to any declaration made by any owner of the land of an intent to dedicate it for a public street.

Other witnesses testified that the strip had been in cultivation almost every year since 1887. It appeared that after 1887 (no definite time is fixed) the city levied assessments for the improvement of Washington street, which runs east and west along the northern end of the strip, and made a map for the assessment of the improvements of Washington street. On the map the strip was shown to be the land of Niles, and not a street, and was assessed to Niles. The sidewalk was curbed along the south side of Washington street and along the thirty feet at the northern end of the strip. It does not appear that the premises claimed to be a street have ever been improved, graded or accepted by the public authorities.

In our opinion the evidence wholly fails to show that the strip was ever dedicated or abandoned to the public as a street.

We advise that the judgment and order be reversed.

Britt, C., and Haynes, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are reversed.

Harrison, J., Garoutte, J., Van Dyke, J.

[L. A. No. 505. Department One.—August 12, 1899.]

JOHN BAXTER et al., Respondents, v. A. D. GILBERT et al., Appellants.

WATER RIGHTS—CLAIM OF SURPLUS WATERS—INTERFERENCE WITH NATURAL FLOW OF STREAM—INJUNCTION.—Where it appears that the respondents as plaintiffs and the nonappealing defendants were entitled to all the waters of a creek and its tributary, which naturally flow within the banks of the creek, the appellants claiming an overflow of surplus waters cannot tap the creek at a point above which there is no overflow of surplus waters, so as to take the water of lakes forming a source of supply to the creek, and to interfere with the quantity of water usually flowing in the natural channel of the creek; and they were properly enjoined from so doing by the judgment appealed from.

APPEAL from an order of the Superior Court of Inyo County denying a new trial. George M. Gill, Judge.

The facts are stated in the opinion of the court.

Richard S. Miner, for Appellants.

Reddy, Campbell & Metson, for Respondents.

GAROUTTE, J.—This action was brought to test the respective rights of plaintiffs and defendants to the waters of Little Pine and Pinyon creeks, and also the waters of certain lakes situated high up in the mountains and forming in a great measure the source of supply of Little Pine creek. Judgment was rendered largely in accordance with the claims of plaintiffs, decreeing that defendants Maiers and Gilbert had no rights in such waters and perpetually restraining them from any interference therewith. Maiers and Gilbert claimed to be appropriators of a certain quantity of the waters, and appeal from the order denying their motion for

a new trial. Plaintiffs are riparian owners on Little Pine creek, and also appropriators. The position of appellants is not sharply defined by their briefs, and we are not entirely satisfied whether their main contention here rests upon the claim of the insufficiency of the evidence to support the findings of fact, or upon erroneous conclusions of law made by the trial court, based upon these findings.

It appears to be conceded that the plaintiffs and the non-appelling defendants are entitled to all the waters of Little Pine creek, and its tributary, Pinyon creek, which naturally flow within the banks of Little Pine creek. But these appellants insist that there is a surplus of water at certain seasons of the year, which arises from the overflow of Little Pine creek, and they claim this surplus. The *modus operandi* for the creation of this surplus water is as follows: Appellants filed three appropriation notices of location of waters. By their first notice they claimed five thousand inches of water measured under a four-inch pressure of a certain lake (describing it), and stating that said waters would be diverted from said lake "by means of an open cut about three hundred feet long by six feet wide and ten feet deep, and will be thus turned into and mingled with the waters of Kersarge creek (Little Pine creek), to be diverted therefrom at a point . . . by a ditch four feet deep by seven feet wide and about two miles long, into the tract of land hereinbefore named." By their second notice of location they likewise claimed five thousand inches of water, under the same pressure, of a certain lake (describing it), and stating that said waters would be diverted "by means of an open cut about three hundred feet long by six feet wide and ten feet deep, and will be thus turned into and mingled with the waters of Kersarge creek (Little Pine creek), to be diverted therefrom at a point . . . by a ditch." By their third notice of location they claimed ten thousand inches of surplus water of Little Pine creek measured under a four-inch pressure. "Said waters will be diverted from said creek at a point where the notice is posted, by means of a ditch four feet wide and ten feet wide and about three miles long." It will be conceded that these two aforesaid lakes largely form the reservoirs from which Little Pine

creek is fed. It is also a fact that the point of appropriation upon Little Pine creek, located by appellants, is some distance above the point of plaintiffs' appropriation.

There is no overflow of the waters of Little Pine creek above the point where appellants tap the creek with their ditch. The evidence is all one way upon this question. It necessarily follows that it was not the overflow of the creek that appellants sought to appropriate, but a certain amount of water in these two aforesaid described lakes. If such appropriation of waters does not interfere with the usual and ordinary quantity of water flowing down the creek, the right of appellants to appropriate is undoubted; but otherwise, if there be an interference with the quantity of water flowing down the stream. If the tapping of these lakes by appellants reduces the amount of water to which plaintiffs are entitled, or shortens the period of time in which they might otherwise secure water from the creek, then the acts of appellants clearly are a trespass upon plaintiffs' rights—exactly the same kind of trespass as though the creek was tapped and that amount of water directly taken therefrom without any molestation of the lakes. Upon this point the trial court made the following finding of fact: "The defendants A. D. Gilbert, O. I. Maiers, and A. F. Maiers, by making the ditch and openings into East lake as herein in these findings described, have lowered and drained said lakes to such an extent as to prevent the water from flowing into the natural channel in said Little Pine creek, and, by doing the work as in these findings described on said East lake, have allowed the waters thereof to escape therefrom and to divert it from the natural channel in said Little Pine creek." There is an abundance of evidence to support this finding of fact. Indeed, it is substantially conceded that appellants have tapped East lake some feet below the natural channel of Little Pine creek, and under those conditions it is self-evident that such an act would materially affect the amount of water flowing down the natural channel of the creek. Upon a careful examination of the record, we are satisfied the evidence is amply sufficient to support the findings of fact made by the trial

court, and we are also satisfied that the conclusions of law based thereon find full support in the evidence.

Appellants rely upon various alleged errors of law committed by the trial court. Many of the questions raised under this head are not material, as the rulings, even if erroneous, do not go to the merits of this appeal. We find no error in the record demanding a reversal of the order.

For the foregoing reasons the order denying the motion for a new trial is affirmed.

Harrison, J., and Van Dyke, J., concurred.

A rehearing in Bank was denied September 12, 1899. On petition for rehearing, the following dissenting opinion was rendered:

BEATTY, C. J.—I dissent from the order denying a rehearing of this case, because I do not think it ought to be finally disposed of here without a decision of the most important question involved—a decision upon which, if in accordance with the contention of the appellants, would necessarily demand a reversal, or important modification, of the judgment appealed from. The right of appellants to interfere with the lakes referred to in the opinion of the court is but one of the questions presented in the briefs of counsel, and to my mind much the less important of the two leading propositions upon which he relies.

It appears from the record that the lands of the plaintiffs are riparian to the stream upon its lower course, near where it empties into Owens river. The stream heads in certain small lakes near the summit of the Sierras, and is fed during the spring and early summer by the melting snows. At such seasons it carries a large amount of water, much more than the plaintiffs can profitably use. The findings of the superior court show that there is a surplus of water when the river is high, but do not indicate the quantity of that surplus. There is evidence to the effect that it is often very large. Notwithstanding this admitted surplus of water over the needs of the plaintiffs, and the fact that it goes to waste below them, the defendants are absolutely enjoined from diverting to their lands any portion of the stream at any time. The question is

thus presented, whether a riparian owner upon the lower course of one of our mountain streams can insist, as against an appropriator whose land is within the watershed of the stream, but nonriparian, that the whole stream in times of flood, when he has no use for the water himself, must come down to him. It may be that this is the riparian doctrine established in this state, but I doubt it; and at all events the question, when it is fairly presented, is too important to be ignored.

[S. F. No. 1770. In Bank—Aug. 14, 1899.]

E. J. BALDWIN, Petitioner, v. SUPERIOR COURT, et cetera, et al., Respondent.

APPEAL FROM NEW TRIAL ORDER—UNDERTAKING TO STAY EXECUTION—SUPERSEDEAS.—An undertaking in double the amount of a judgment for the recovery of money is sufficient to stay execution upon appeal from an order denying a new trial, though there is no appeal from the judgment; and a writ of supersedeas will issue from this court to prevent the plaintiff from enforcing the judgment pending such appeal.

MOTION in the Supreme Court for a writ of supersedeas stay execution upon the judgment pending an appeal from an order of the Superior Court of the City and County of San Francisco, denying a new trial. John Hunt, Judge.

The facts are stated in the opinion of the court.

Byron Waters, for Petitioner.

T. J. Roche, and Linforth & Whitaker, for Respondents.

THE COURT.—This is a petition for a writ of supersedeas to stay all proceedings upon a certain judgment against petitioner pending an appeal. The judgment was rendered in the superior court against petitioner, and in favor of one Roche, for a certain sum of money; petitioner appealed from an order denying his motion for a new trial and gave an undertaking in double the amount of the judgment, but has not appealed from the judgment; and the plaintiff in the action

is proceeding to enforce the judgment by execution, notwithstanding the undertaking, upon the theory that the execution of a judgment directing the payment of money cannot be stayed upon an appeal from an order denying a new trial, where there is no appeal from the judgment itself. It was held otherwise, however, in the recent case of *Holland v McDade*, ante, p. 353, and upon the authority of that case the petition must be granted.

Let the writ of supersedeas issue as prayed for in the petition.

[L. A. No. 554. Department One.—Aug. 16, 1899.]

THE NEWPORT WHARF AND LUMBER COMPANY,
Appellant, v. H. L. DREW et al., Respondents.

MECHANICS' LIENS—NOTICE BY MATERIALMEN—GARNISHMENT—STOPPAGE OF FUTURE PAYMENTS.—A notice given by materialmen to the trustees of an asylum demanding payment of their claims out of the balance remaining due to a contractor who had agreed to furnish materials and perform labor upon a ward building for the asylum, is equivalent to a garnishment of the moneys then payable to the contractor, the effect of which is to be determined by the rights of the contractor as to payments already matured, and also operates as a notice that the payment of any moneys thereafter becoming payable under the terms of the contract, otherwise than to the claimants, would be at the peril of the trustees.

1D.—EFFECT OF NOTICE UPON MATURED INSTALMENTS—ASSIGNMENT BY CONTRACTOR.—If the contractor is still entitled to demand payment of instalments already matured at the time of the notice, payment to him is intercepted by the notice; but if he has already assigned them to a third party, the notice will be inoperative to prevent their payment to such party.

1D.—AGREEMENT FOR SATISFACTION OF TRUSTEES—ESTIMATES BY SUPERINTENDENT—APPROVAL AND DIRECTION FOR PAYMENT—ASSIGNABILITY OF ESTIMATES.—Under a contract providing that the work should be done to the satisfaction of the trustees of the asylum, and that ninety per cent of the value of the work and materials should be paid in monthly instalments as the work progresses, upon estimates made by the superintendent of construction, the approval of an estimate by the trustees, and their direction for its payment, without any formal declaration of their satisfaction, vests in the contractor the right to the immediate payment of the monthly in-

stalment of ninety per cent. Such estimates of value are assignable by the contractor prior to their approval; and the subsequent approval thereof, prior to notice from a materialman, inures to the benefit of the assignee.

ID.—PROVISION FOR CONTROLLER'S WARRANTS.—The maturity and assignability of the monthly instalments, after approval of the estimates of value, and direction for payment, are not affected by a provision in the contract for payment in controller's warrants, nor by the failure to procure such warrants immediately upon the approval of the estimates.

ID.—NOTICE BY MATERIALMAN BEFORE APPROVAL OF ASSIGNED ESTIMATE.—The notice by a materialman of his claim against the contractors given prior to the approval of an assigned estimate, intercepts the payment to the contractors before their right to receive the money has accrued, and any assignment thereof by the contractors prior to maturity of the instalment is ineffective as against the materialman.

ID.—ASSIGNMENT TO BANK—PRESIDENT AS TRUSTEE OF ASYLUM—AUTHENTICATION OF ESTIMATES.—The fact that the assignment of the estimates was made to a bank as security for money borrowed from the bank, and that its president was chairman of the board of trustees of the asylum for which the work was done, does not disqualify such president from acting as a member of the board of trustees in approving the estimates of the superintendent of construction, or from authenticating the action of the board as its chairman, though the effect of such action is to render the amount immediately payable to the bank.

APPEAL from a judgment of the Superior Court of San Bernardino County and from an order denying a new trial.
John L. Campbell, Judge.

The facts are stated in the opinion of the court.

J. S. Chapman, and James G. Scarborough, for Appellant.

Otis & Gregg, for Respondent.

HARRISON, J.—Dewar & Chisholm, as contractors, entered into a contract with the board of trustees of the Southern California State Asylum for the insane and inebriates, January 5, 1894, by which they agreed to perform the labor and furnish the material required for the carpenters' and plasterers' work of a ward building for the asylum, at an agreed price to be paid as follows, viz., ninety per cent of the value of materials used and labor performed "as the work

progresses," and payment in full "upon the acceptance of said work by the board of trustees." For the purpose of determining the amount of the several payments, the contract provided that the superintendent of construction should for each payment make a certificate "showing a full and accurate estimate of the labor performed and materials furnished under the contract, with the amount due thereon," which estimate should, in all cases, give the amount of the preceding estimates, if any, and the amount of labor performed and materials furnished since the last estimate; and it was further provided that these estimates should not be required oftener than once a month, and that the trustees of the asylum should retain from each and all payments a sum amounting to ten per cent of the amount thereof, "until the completion and acceptance of said work" by them. Under these provisions ten estimates, or certificates, were made by the superintendent of construction, of which the first seven were paid to the contractors. The controversy herein relates only to the last three estimates and the ten per cent of the contract price retained by the trustees.

The customary mode of making these estimates was as follows: A certificate showing the labor performed and materials furnished by the contractors subsequent to the proceeding one, together with their value, was prepared in the form of a bill of account in behalf of the contractors, with the approval of the superintendent of construction indorsed thereon, and was presented to the board of trustees for its allowance and order for payment. Upon the allowance and order for payment of this bill a warrant was drawn by the state controller in favor of the trustees for the payment of ninety per cent of its amount and delivered to them. In this manner the eighth estimate, amounting to \$2,814.75, was presented to the board of trustees, and by that body allowed and ordered paid January 14, 1895, and a warrant for ninety per cent thereof, viz., \$2,533.28, was drawn by the controller in favor of the trustees March 2d, and thereafter paid to the trustees. The ninth estimate, for \$649.75, was presented and allowed February 11th, and a warrant for ninety per cent thereof, viz., \$584.78 was drawn March 29th and paid to the trustees. March 18th the tenth and final

estimate, for \$725.90, was presented and allowed, and the work of the contract having at that time been completed, a warrant for \$2,579.33, the amount of this estimate, together with the amount of the previous deductions of ten per cent, was drawn in favor of the trustees and paid May 17th.

The plaintiff herein furnished materials to Dewar & Chisholm at various times prior to February 7, 1895, which were used in the performance of their contract, and on March 1, 1895, gave to the board of trustees a notice in writing of that fact, and that there was remaining unpaid thereof the sum of \$6,654.10, and demanded payment of it for the balance then remaining unpaid to Dewar & Chisholm. Dewar & Chisholm borrowed money at different times during the performance of their contract from the Farmers' Exchange Bank, one of the defendants herein, and in some instances executed their promissory notes therefor, and assigned to the bank the estimates of the superintendent of construction as security for their payment. The superintendent of construction was accustomed to give to them informal certificates, or estimates, before presenting them to the board of trustees for allowance, and upon their receipt Dewar & Chisholm assigned them to the bank, as such security, with directions that the amount of the estimate be paid to the bank. Such informal certificate for the eighth estimate was made December 28, 1894, and was assigned to the bank on the next day as security for a note of two thousand dollars, with an order for its payment to the bank. The ninth estimate is dated February 11, 1895, and was in like manner indorsed over to the bank February 13th. After the approval of these estimates by the board of trustees and an order for their payment, the cashier gave notice to the trustees that they had been assigned to the bank, and requested that the amount thereof should be paid to it. The tenth informal certificate is dated February 15th, and states that it will be presented to the trustees for their approval March 11th. It was indorsed over to the bank on the day of its date, and on the same day the cashier gave notice thereof to the trustees, stating therein that the estimates would be presented to the board at its next meeting.

At the meeting of the trustees March 18th, at which the tenth estimate was approved, the above notice given by the

plaintiff to the trustees was considered by them, and they determined that inasmuch as the above three estimates had been assigned for value to the bank, prior to the receipt of the notice, the amount thereof should be paid to the bank and not to the plaintiff. Thereupon the plaintiff brought the present action for the purpose of determining the respective rights of it and the bank to the same. The superior court held that the bank was entitled to the unpaid amount of its advances upon the estimates of Dewar & Chisholm, and that the plaintiff was entitled to the surplus thereof, and rendered judgment accordingly. From this judgment and the order denying a new trial the plaintiff appealed.

1. The effect of the notice of March 1st, given by the plaintiff to the trustees, was to intercept in their hands any money which Dewar & Chisholm were then entitled to receive, or which afterward might be payable to them in accordance with the terms of their contract. The notice was equivalent to a garnishment of the moneys then payable to them, and also operated as a notice to the trustees of the plaintiff's claim against Dewar & Chisholm, and that the payment to the latter of any moneys that might thereafter become payable to them under the terms of the contract would be at the peril of the trustees. The contractor cannot prevent the effect of this notice as to any payments that may mature after it is given, but its effect upon payments that have matured, before it is given, but which have not been made, is to be determined by the rights of the contractor in reference to them. If he is still entitled to demand their payment from the owner, such payment is intercepted by the notice, but if he has already assigned them to a third party the notice will be inoperative to prevent their payment to such party. (Code Civ. Proc., sec. 1184; *Bates v. Santa Barbara County*, 90 Cal. 543; *First Nat. Bank v. Perris Irr. District*, 107 Cal. 55.)

The provision in the contract for the payment of ninety per cent of the value of materials used and labor performed "as the work progresses," with the condition that, before any payment should be made, the superintendent of construction should, not oftener than once a month, furnish an "estimate" of such labor and materials, "with the amount due thereon,"

rendered such instalment of the contract price due and payable immediately upon the acceptance of the work by the trustees. The contract provided that the work should be done to the satisfaction of the board of trustees, and the contractors were not entitled to demand payment of the amount of the estimate until after such approval and acceptance. Their approval of the estimate and direction for its payment implied their satisfaction with the work without any formal declaration to that effect. Upon such approval and direction the obligation of the state which had been created in favor of the contractors by the trustees became complete, and the right of the contractors to immediate payment became vested in them and was subject to their disposition. The provision in the contract for payment of the contract price in controller's warrants on the state treasurer did not affect this power of disposition, or right to immediate payment, or suspend its exercise until such warrants should be obtained. The failure or neglect to obtain a warrant immediately upon the approval of the estimates would have no greater effect than a similar failure on the part of the contractor, in the case of an ordinary building contract, to obtain a check from the owner immediately upon receiving the architect's certificate that the instalment is payable.

As seen above, the eighth and ninth estimates were approved and ordered paid before the plaintiff gave the notice of March 1st, but prior to the giving of the notice the contractors had assigned these estimates for value to the Farmers' Exchange Bank and were no longer entitled to receive the amount of the warrants drawn therefor. The right of the bank to receive the amounts for which the warrants were drawn was not affected by the fact that the assignment had been made before the estimates were approved by the trustees. The contractors had assigned whatever claim they had by virtue of the "estimates," and the subsequent approval by the trustees, prior to receiving the notice from the plaintiff, inured to the benefit of their assignee. At the time the tenth estimate was presented to the trustees the plaintiff had given notice of its claim, and had thus intercepted the payment to the contractors before their right to receive the money had accrued. Any assignment thereof by the contractors prior to the time when this estimate was payable was ineffective as against the plaintiff.

By the terms of the contract "payment in full" was not to be made until the "acceptance of said work by the board of trustees"; and the trustees were to retain, "until the completion and acceptance of said work" by them, ten per cent of all payments. The aggregate of the estimates was \$19,260.40, and ten per cent thereof, viz., \$1,920.04, was to be so retained until the acceptance of the work. This amount is included in the warrant covering the amount of the tenth estimate, and was not ordered to be paid until March 18th. There is nothing in the record showing that the work was accepted by the trustees prior to that date, and, as at that time the plaintiff had given its notice of claims, it must be held that this notice had the effect to cut off the right of the trustees to make the payment to the contractors, or to their order, and gave to the plaintiff the right to receive it

2. Each of the above estimates made by the superintendent of construction was presented to the board of trustees and approved by it, and is indorsed "Examined, allowed, and ordered paid by the board of trustees this — day of —, 1895," with the date of such approval, and is authenticated by the signature "H. L. Drew, chairman." It is contended by the appellant that as Drew was at the times of such approval the president of the Farmers' Exchange Bank, he was disqualified from acting as one of the trustees of the asylum in the approval of the estimates.

The board of trustees of the asylum consists of five members, and it does not appear from the record that Mr. Drew participated in the action of the board when it approved these estimates and directed their payment. The authentication by him of the action of the board was subsequent thereto and was only a ministerial act.

Drew's position, however, as one of the trustees, was not such as to disqualify him from acting upon the estimates of the superintendent of construction. Under the provisions of section 7 of the "Act to regulate contracts on behalf of the state in relation to erections and buildings" (Stats. 1876, p. 430) it is made the duty of the "officer to whom is confided the duty of superintending the erection of any state asylum, building, or improvement," at the times named in the contract for constructing such building, to make an estimate of

the amount of each payment to be made, and the warrant of the controller is to be drawn upon the treasurer for the amount of such estimate. Under the statute authorizing the construction of this asylum (Stats. 1889, p. 120) the trustees therein created are empowered to appoint a competent person to superintend its construction. The contract between the parties and Dewar & Chisholm was in conformity with the above provisions of the act of 1876, and was approved by the attorney general as provided in that act, and by its terms these estimates were to be made by the superintendent of construction. The trustees appointed T. H. Goff as such superintendent of construction, and he was, therefore, the officer to whom, in the terms of the act of 1876, was confided the duty of superintending the erection of the asylum, and whose duty it was under said act, as well as under the contract with Dewar & Chisholm, to make the aforesaid estimates. By the terms of the contract the work was to be done to the satisfaction of the board of trustees, as well as that of the superintendent of construction, and the approval by the trustees of the several estimates when presented operated as an acceptance of the work done on the contract prior to the dates of such approval. Their function, however, was merely to declare their approval or disapproval of the work and to determine its conformity with the terms of the contract, while the function of fixing the amount of the payment, both under the statute and by the terms of the contract, devolved upon Goff. Upon their acceptance of the work the contractor became immediately entitled to the payment of the amount of the estimate. The state alone was interested in securing a satisfactory compliance with the contract, and under section 10 of the act of 1876 could at any time question the act of Drew in fraudulently accepting the same; but the plaintiff herein is not in a position to object to such acceptance, even if it had been open to objection. It is not suggested that Dewar & Chisholm failed in any respect to complete their contract according to its terms, nor is it claimed that Drew was in any respect negligent, or unmindful of his obligations as trustee, the claim of the plaintiff being that by reason of his dual relation he was disqualified from accepting the work, upon the ground that by such acceptance he enabled

the bank in which he was interested to receive the amount of the estimate. Such advantage to the bank did not, however, flow directly to it from the acceptance of the work, but was merely an incidental consequence thereof. The acceptance of the work was not invalidated by reason of Drew's relation to the bank, even though its effect was to cause the amount of the estimate to become immediately payable.

The judgment and order denying a new trial are reversed.

Garoutte, J., and Van Dyke, J., concurred.

[L. A. No. 510. Department One.—August 17, 1899.]

VERNON SCHOOL DISTRICT, Appellant, v. BOARD OF EDUCATION OF CITY OF LOS ANGELES, Respondent.

ANNEXATION OF TERRITORY TO CITY—CONSTITUTIONAL LAW—SPECIAL LEGISLATION.—The act of 1889, "to provide for the alteration of the boundaries of, and for the annexation of territory to, incorporated towns and cities, and for the incorporation of such annexed territory in and as part of such municipalities, and for the districting, government, and municipal control of annexed territory," is constitutional, and is not special legislation because conferring upon the electors of any municipality alone the privilege of petitioning the municipal authorities to make the proposed annexation, to the exclusion of the electors of the annexed territory, the residents of which are fully protected by requiring a majority of the voters thereof to authorize the annexation.

ID.—TITLE OF ACT.—The title of the act providing for such annexation is broad enough to include a provision that the "annexed territory shall be to all intents and purposes a part of such municipal corporation, except only that no part of such annexed territory shall ever be taxed to pay any portion of any indebtedness or liability of such municipal corporation contracted prior to or existing at the time of such annexation."

ID.—ANNEXATION OF PART OF SCHOOL DISTRICT.—School property forming part of annexed territory belongs to the city to which the territory is annexed, and is under the control of its board of education; and the fact that it formed part of a school district, which still maintains the organization and name of the original school district, is immaterial.

ID.—DIVISION OF PROPERTY.—In the absence of statutory provisions governing the ownership of municipal property, or of a school district, upon the division thereof, property consisting of real estate belongs to the municipality within which it is located as the result of the division.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial. Waldo M. York, Judge.

The facts are stated in the opinion.

A. B. Hotchkiss, for Appellant.

W. E. Dunn and Francis J. Thomas, for Respondent.

HAYNES, C.—Action to quiet title. Defendant had judgment, and plaintiff appeals therefrom and from an order denying a new trial.

In 1876 the plaintiff purchased the property in question for school purposes, and the same was conveyed to the trustees of said district for school purposes only. In 1896 certain territory was added to the city of Los Angeles, which added territory embraced a portion of said Vernon school district, including said schoolsite and improvements. It is conceded that the proceedings for the annexation of said additional territory to the city of Los Angeles were regular, and the validity of said annexation is not questioned, except by an attack upon the constitutionality of the act of 1889, under which the annexation proceedings were taken. The portion of Vernon school district not included in the annexed territory still maintains its organization and name as such district, and prosecutes this suit to quiet its title to the property formerly conveyed to it for school purposes, but which is now within the limits of the city of Los Angeles; and the question is, whether said lot is now owned and should be controlled by said Vernon school district, or by the board of education of said city.

It is contended that the act of 1889 (Stats. 1899, p. 358) is unconstitutional, in that it confers upon the electors of the municipality a special privilege not conferred upon the electors of the territory proposed to be annexed, viz., that of petitioning the municipal authorities to make the proposed annexation. This provision of the statute, however, applies

to the electors of all towns and cities, and is inapplicable to all those not similarly situated. The statute is therefore general and not special, and does not confer a special privilege, since it is a privilege not denied to any elector or electors of any town or city.

The residents of the territory proposed to be added are, however, fully protected, as the annexation cannot be made unless the proposition to annex shall be submitted to the electors of such territory, as well as to the electors of the municipality, and authorized by a majority of the voters thereof.

Appellant also contends that if the effect of the annexation under the act of 1889 is to make the board of education of the city the successors in office of the trustees of the Vernon school district, such purpose of the act is not expressed in its title.

The title of said act is as follows: "An act to provide for the alteration of the boundaries of and for the annexation of territory to incorporated towns and cities, and for the incorporation of such annexed territory in and as part of such municipalities, and for the districting, government, and municipal control of annexed territory"; and the act provides: "And thenceforth such annexed territory shall be to all intents and purposes a part of such municipal corporation, except only that no part of such annexed territory shall ever be taxed to pay any portion of any indebtedness or liability of such municipal corporation contracted prior to or existing at the time of such annexation." It is too clear to require argument or illustration that this provision in the body of the act is within its title, and that for all municipal purposes, except as above stated, the annexed territory is part of the city of Los Angeles, and subject to the same municipal control and the operation of the same statutes that it would have been if originally incorporated therewith. If, therefore, public schools and school property within municipalities are subject to municipal control it follows that the school property here in question belongs to the city and is rightfully in the possession and under the control of the board of education of said city, and is its property. Even if this territory had not been annexed to the city for municipal purposes under the act of 1889, but upon petition had been annexed to the city "for school purposes only," the part of Vernon school district so,

annexed would have been under the sole control of the board of education of the city. (Pol. Code, sec. 1576, as amended; Stats. 1891, p. 157.)

So, in the absence of statutory provisions governing the ownership of municipal property upon the division of a municipality, municipal property, consisting of real estate, belongs to the municipality within which it is located by the division. (*Los Angeles County v. Orange County*, 97 Cal. 331, and authorities there cited.) Any other conclusion would involve a conflict of jurisdiction not to be tolerated.

I advise that the judgment and order appealed from be affirmed.

Cooper, C., and Britt, C., concurred.

For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

Harrison, J., Van Dyke, J., Garoutte, J.

[L. A. No. 553. Department One.—August 19, 1899.]

JOHN STEWART, Respondent, v. LOUISE NAUD, Appellant.

WAREHOUSE—SALE OF STORED GOODS FOR CHARGES—ACTUAL NOTICE TO OWNER ESSENTIAL.—Under the statutes of this state, a sale of goods stored in a warehouse, to satisfy the lien of the warehouseman for unpaid storage charges, if the goods are other than perishable property, baggage or luggage, can only be made at auction after such actual notice to the owner of the time and place of sale, and notice to the public usual at the place of sale, as is required in the case of the sale of pledged property, or upon foreclosure of the right of redemption by a judicial sale under the direction of a competent court.

ID.—SALE OF HOUSEHOLD GOODS—CONVERSION.—Upon the sale of stored household by a warehouseman to pay storage charges thereon, without actual notice to the owner, the warehouseman is liable to the owner for conversion of the goods.

ID.—NEGLIGENCE OF WAREHOUSEMAN—IGNORANCE OF OWNER'S ADDRESS. The negligence of the agent in charge of the warehouse in not having noted the address of the owner of the goods on the warehouse

books, as requested, was the negligence of the warehouseman; and the resulting ignorance of his address cannot excuse the want of actual notice to him of the time and place of sale.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order denying a new trial. Lucien Shaw, Judge.

The household goods in controversy were sold at auction by the defendant for seventy-five dollars, to pay storage charges of nineteen dollars and fifty cents. The plaintiff recovered six hundred dollars, with interest and costs, for the conversion thereof.

Further facts are stated in the opinion.

P. W. Dooner, for Appellant.

McLachlan, Cohrs & Landt, for Respondent.

HAYNES, C.—Defendant conducted the business of a warehouseman in the city of Los Angeles. Some time prior to August 9, 1895, the plaintiff stored in defendant's warehouse fourteen boxes described as containing household goods, which, as shown by the testimony of the plaintiff, were packed in April, 1892, in Canada, and shipped to Los Angeles. In July, 1895, plaintiff paid the freight charges and storage up to August 9, 1895, and defendant gave him a warehouse receipt for said goods bearing said date, in which the subsequent storage charges were fixed at one dollar and fifty cents per month. On September 1, 1896, no part of the storage dues accruing after August 9, 1895, having been paid, the defendant sold said fourteen packages to pay said storage charges.

This action is for the conversion of said goods by the defendant. It was tried by the court without a jury, the findings and judgment were for the plaintiff, and defendant appeals from the judgment and from an order denying a new trial.

Many questions are discussed by counsel; but the more important are as to the sufficiency of the notice of sale, and whether the conditions existed which justified or authorized a sale.

Touching the notice of sale the answer alleged: "That prior to said sale she caused due and sufficient notice thereof to be published daily in the Los Angeles 'Herald,' a daily

newspaper of general circulation, printed and published in Los Angeles city aforesaid, for ten consecutive days next before said day of sale, and caused a copy of said notice to be posted for the same period in a conspicuous place at the auction room of Thomas B. Clark (a duly licensed auctioneer, by whom said sale was made and conducted), at a room 232 West First street, in Los Angeles city, and a further copy of said notice to be posted for the same period in a conspicuous place in the said warehouse." There was no allegation of notice to the plaintiff.

There was evidence tending to show that about the 5th of August the defendant's bookkeeper wrote a letter to the plaintiff, informing him that his goods would be sold on the 1st of September, unless the storage charges were paid prior to the sale, which letter was addressed to the plaintiff at "Los Angeles City," that he had no exact information as to his residence, and that the letter was never returned; while on the part of the plaintiff the evidence was to the effect that it was never received, and that the city directory showed that there were several persons in the city having the same name as the plaintiff.

The plaintiff testified, in substance, that Hopkins, who was in charge of the warehouse at the time the goods were stored therein (and up to the end of July, 1896, at which time the defendant took personal charge of the business), knew the residence of plaintiff and had been at his house after the goods were stored, and had been requested by plaintiff to enter his address on the warehouse books, but this was not done. Hopkins was not a witness, and this testimony was not rebutted.

The court found that "the defendant sold all of said property in the manner and after notice as alleged in the answer, without the knowledge or consent of the plaintiff, and wrongfully converted the same to her own use."

At common law, a warehouseman had a lien for storage charges, but such lien conferred no right to sell the property to which the lien attached, but only to hold it until his charges were paid. (Jones on Liens, sec. 676.) Such common-law liens were enforced by obtaining judgment for the charges and levying an execution upon the goods. In most of the states, however, a remedy by sale is provided by statute, though only in a few states are there any statutes expressly

enacted for the purpose of providing a remedy for the enforcement of a warehouseman's lien, while in other states there are statutes applicable to the enforcement of all common-law liens. In this state, section 1856 of the Civil Code, added in 1891 (Stats. 1891, p. 470) reads as follows: "A depositary for hire has a lien for storage charges, which is regulated by the title on liens."

At the same time section 1857 was added to the same code, as follows: "If, from any cause other than want of ordinary care and diligence on his part, a depositary for hire is unable to deliver perishable property, baggage, or luggage received by him for storage, or collect his charges due for storage thereon, he may cause such property to be sold in open market to satisfy his lien for storage; provided, that no property except perishable property shall be sold, under the provisions of this section, upon which storage charges shall not be due and unpaid for one year at the time of such sale"; and the act repealed all acts and parts of acts in conflict with its provisions.

The section of the Civil Code last above quoted is the only one expressly relating to sales of stored property for the payment of charges found in the article relating to storage, while the first of said new sections declares that the lien of the depositary for hire is "regulated by the title on liens."

Section 1857, however, has no application to this case. It applies only to perishable goods, and baggage or luggage, and the court found, upon sufficient evidence, that the goods in question did not belong to either of these classes. It is, therefore, not necessary to consider or decide what construction should be given to that clause relating to the length of time the charges for storage must be due and unpaid to authorize a sale under its provisions.

Turning to the title on liens, we find that: "A pledgee, or pledgeholder for reward, assumes the duties and liabilities of a depositary for reward" (Civ. Code, sec. 2887); and "a gratuitous pledgeholder assumes the duties and liabilities of a gratuitous depositary." (Civ. Code, sec. 2998.) These sections, as well as the general similarity between pledgeholders and depositaries, would seem to make the provisions relating to the sale of pledged property appropriate to the sale of property by a depositary for hire in the absence of special pro-

visions relating to the latter. The provisions of the Civil Code relating to the sale of pledged property are sections 3000 to 3011; and they require a sale by auction upon notice to the public usual at the place of sale, and "actual notice to the pledgor of the time and place of sale, at which the property pledged will be sold, at such reasonable time before the sale as will enable the pledgor to attend"; or the "pledgee may foreclose the right of redemption by a judicial sale under the direction of a competent court."

The negligence of Hopkins, who was in charge of defendant's warehouse, in not noting plaintiff's address, as requested, was the negligence of defendant; and the defendant's want of knowledge of the residence of plaintiff could not, under these circumstances, if at all, excuse the want of actual notice to him of the time and place of sale.

I advise that the judgment and order appealed from be affirmed.

Gray, C., and Cooper, C., concurred.

For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

Garoutte, J., Van Dyke, J., Harrison, J.

Hearing in Bank denied.

[Sac. No. 647. Department One.—August 22, 1899.]

DANIEL McKENZIE, Appellant, v. JAMES H. BUDD et al., Respondents.

ESTATES OF DECEASED PERSONS—WILL—DECREE OF DISTRIBUTION TO WIDOW—EXECUTION SALE OF SON'S INTEREST—VOID TITLE.—A decree of distribution of the estate of a deceased person, distributing the whole of the residue of the estate in fee to the widow, unappealed from, is conclusive upon the question that upon his death she was the owner of the whole of his estate; and the sale under execution of the interest of a son under a will purporting to give a life estate to the widow while remaining such, and the residue to his lawful heirs at her death, and the deed thereof to the purchaser at such sale, pending administration, conveyed no title to the purchaser.

Id—DISTRIBUTION OF ESTATE OF WIDOW—DEED OF SON—AFTER ACQUIRED TITLE.—The deed of the son pending the administration of his father's estate, of his interest therein, not purporting to convey title in fee, will not carry an after-acquired title distributed to the son under a decree of distribution of the estate of his mother who, as widow, was the sole distributee in fee of the father's estate.

APPEAL from a judgment of the Superior Court of San Joaquin County and from an order denying a new trial. Edward I. Jones, Judge.

The facts are stated in the opinion of the court.

Budd & Thompson, for Appellant.

Minor & Ashley, for Respondents.

GAROUTTE, J.—This action is brought to quiet title to certain real estate, and arises upon the following state of facts:

Andrew Smith died, disposing of the real estate here involved, by will, as follows: "I give and bequeath to my wife, Mary Ann Smith, all of the real and personal property of which I die possessed, so long as she remains my widow; and at her death the residue of said property to be equally divided among my lawful heirs." Pending the administration of Smith's estate the wife died, and letters of administration were taken out upon her estate. By decree of distribution in his estate the court found: "That said Mary A. Smith, by reason of her community right aforesaid, and under and by virtue of the terms of the will of said deceased, was, at the time of her death, the owner of the whole residue of the estate of said Andrew Smith, deceased." By that decree it was ordered that the property of his estate be turned over to the estate of his wife, and this was done. Thereafter, by the decree of distribution in her estate, the property was distributed to her heirs. The defendant, V. J. Smith, is a son of the deceased father and mother. Defendant, J. H. Budd, is a grantee under a deed made by V. J. Smith, pending the administration of his father's estate. Budd appeared at the trial and disclaimed any interest in the property. Plaintiff McKenzie, by attachment, levied upon the interest of V. J. Smith in the real estate left by his father. Under this attach-

ment the real estate was sold, McKenzie becoming the purchaser, and he now holds a deed under that sale. All of these matters occurred during the administration of the father's estate and prior to the mother's death.

By the decree of distribution in the father's estate it was determined that Mrs. Smith took title to this land in fee. Hence the attachment by the sheriff and sale thereunder to plaintiff went for nothing. Plaintiff's deed gave him no title, for defendant Smith had no title. In this collateral proceeding the decree of distribution in the father's estate is conclusive upon all the world. This court cannot say in this proceeding that the will of Andrew Smith was improperly construed by the decree of distribution, or that his wife was declared the owner of a greater interest in the land than that which should have been allotted to her. The later cases upon this question are to the effect that the decree of distribution entered in the estate of Andrew Smith is conclusive upon the question that his wife, Mary Ann Smith, was, at the instant of her death, the owner of his entire estate. It is said in *Cunha v. Hughes*, 122 Cal. 112; 68 Am. St. Rep. 27: "The decree of distribution becomes the measure of the rights of all claimants to the estate, and their rights are to be determined by the terms of this decree." The same doctrine is recognized and approved in *William Hill Co. v. Lawler*, 116 Cal. 359; *In re Trescony*, 119 Cal. 568; and *Jewell v. Pierce*, 120 Cal. 82. There is nothing in *Chever v. Ching Hong Poy*, 82 Cal. 68, opposed to this doctrine. It follows for these reasons that plaintiff has no title to the land involved in this litigation, and is entitled to no relief.

It is further claimed that defendant Smith, under the decree of distribution in his mother's estate, became possessed of an after-acquired title which passed to Budd under his deed of grant, and, therefore, he is estopped from making claim of title in himself in this action. This would seem to be a matter wholly between the defendants, Smith and Budd. Plaintiff gets no title by that transaction. His claim of title is entirely independent of it, and, having no title of any kind in himself, his claims must fall, regardless of the status of the title as between Budd and Smith. It may be further suggested that the Smith deed did not purport to convey title in fee, hence it carried no after-acquired title.

For the foregoing reasons the judgment and order are affirmed.

Van Dyke, J., and Harrison, J., concurred.

[L. A. No. 612. Department One.—August 23, 1899.]

In the Matter of the Estate of MARY J. ARMSTRONG, Deceased. B. F. H. ODELL et al., Appellants, v. D. W. FIELD, Administrator, etc., Respondent.

ESTATES OF DECEASED PERSONS—ADMINISTRATOR'S ACCOUNT—SALE OF PERSONAL PROPERTY—REDEMPTION FROM LIEN—LOSS WITHOUT NEGLIGENCE.—An administrator is not liable to be charged in the settlement of his account for a loss on the sale of personal property, by reason of having paid a lien thereon in good faith, believing that the property was worth more than the amount of the lien, but which was sold without negligence on his part for less than that amount. It is only in circumstances where the court can say, as matter of law, that a reasonably prudent man might not make the honest mistake of paying out more to free the property from a lien than the property would sell for, after the lien was extinguished, that the administrator can be charged with the loss.

ID.—FORECLOSURE OF MORTGAGE OF DECEDENT—COLLATERAL ATTACK FOR ERRORS—LIABILITY OF ADMINISTRATOR—PROOF OF NEGLIGENCE REQUIRED.—The amount of the judgment rendered upon the foreclosure of a mortgage executed by the decedent, cannot be collaterally attacked for the purpose of charging the administrator with errors therein, without proof of negligence upon his part.

ID.—INCLUSION OF TAXES—WAIVER OF OBJECTION—PLEADING—PRESUMPTION.—The technical objection that an amount of taxes included in the decree as having been paid by the mortgagee upon the mortgaged property was not supported by the pleadings, is waived if not urged prior to the decree, and the administrator cannot be charged therewith in his account, where it appears that the amount allowed was correct in fact, and accorded with a stipulation in the mortgage. Negligence cannot be imputed to the administrator by presumption for failure to object to proof of the taxes actually paid by the mortgagee; but it must be presumed, in support of the decree, that the question as to the amount of taxes was heard and determined by the court upon the theory that the complaint was sufficient, and the issue properly before the court.

ID.—AMOUNT OF INTEREST IN DECREE—INSOLVENCY OF ESTATE—OBJECTION BY DEVISEES.—Devisees, who, if the estate is insolvent, can have no interest in the question, cannot object that the administrator should be charged with an excess of interest allowed in the decree of foreclosure, according to the terms of the note, above the legal rate, after notice to creditors, on account of the insolvency of the estate, where no creditors appear to object thereto. The devisees can raise no objection to the amount of the decree, where it appears that, if the amount of error therein claimed to be charged to the administrator were allowed, there would not be sufficient on hand to pay the creditors.

ID.—FAILURE TO APPRAISE MORTGAGED PROPERTY—USELESS EXPENSE.—Where there is no evidence that the real estate of the decedent subject to mortgage could, at any time during the administration of the estate, have been sold for enough to pay off the mortgage upon it, and there is evidence to indicate that in the condition of the real estate market it could not have brought the amount of the mortgage, and that it would have been a useless expense for the administrator to have it appraised, he cannot be charged with negligence in failing to do so.

ID.—NEGLIGENCE IN SETTLEMENT OF ESTATE—INTEREST, WITH ANNUAL RESTS.—Where the administrator has been negligent in failing to settle the estate, he is properly chargeable with legal interest on the balance in his hands, with annual rests, until the allowance of his account.

APPEAL from an order of the Superior Court of Los Angeles County settling the final account of an administrator.
W. H. Clark, Judge.

The facts are stated in the opinion.

Henning & Bowen, for Appellants.

Wells & Lee, for Respondent.

Cooper, C.—Appeal from order allowing final account of administrator. Deceased died October 20, 1889, leaving personal property which sold at public sale for \$681.79, and ten acres of land upon which there was a mortgage for \$5,500. Claims were presented and allowed against said estate amounting to over \$1,000. The administrator filed his final account in 1897, to which many objections and exceptions were made by the appellants, but two of which are urged upon this appeal.

1. It is first claimed that the court erred in not charging

the administrator with \$32.75 loss on sale of two horses belonging to the estate. It appears that at the time of the death of deceased the two horses had been for several months out on pasture with one McMaster. That the administrator was informed by one of the creditors that the horses were assets of the estate. That thereupon the said administrator found the horses in the possession of McMaster, who claimed a lien upon them for pasturage to the amount of \$93.66. After some negotiations McMaster agreed to accept \$89.50 in full, which the administrator paid and the horses were delivered to him. The administrator testified that at the time he believed the horses would sell for considerable more than the amount of the lien, but that he sold them at public auction and they only brought \$56.75. This testimony was not contradicted, and there was no evidence of want of good faith on the part of the administrator. The sale was approved without objection after due notice given. It appears that the transaction resulted in a loss to the estate of \$32.75, but the loss cannot, from the testimony, be attributable to the negligence of the administrator. He appears to have acted in good faith and for what he deemed to be the best interest of the estate, and he could not legally be charged with the loss of the sum unless it had been made to appear that he was guilty of negligence in not using ordinary care and diligence in connection with the matter. (*In re Moore*, 93 Cal. 525.)

It is not claimed that the administrator did not have the authority to redeem the horses, neither is it claimed that there was not a valid lien upon them. The specification is for gross mismanagement of the estate in selling the horses for less than the amount paid out for redemption, but no proof is before us of any want of good faith in the transaction. The act might have been for the benefit of the estate, and as there is no proof of negligence or want of ordinary care, and the proof shows that the administrator acted in good faith, we must hold that if his acts could under any state of facts be sustained as valid they must be presumed to be valid under such state of facts rather than to be held invalid from the mere fact that the property did not sell for enough to repay the amount paid out by the administrator. (*Burnett v. Lyford*, 93 Cal. 119.)

We do not lay down the rule that an administrator can,

of his own volition, redeem pledged personal property or property upon which there is a valid lien under all circumstances, and justify his acts in case of loss to the estate. If the proof should show that the property at the time it was redeemed was of little value, while a large amount was paid out for the purpose of redeeming it, or if the circumstances were such that we could not say a reasonably prudent man would have done the same thing, then the circumstances might justify the charging of the loss to the administrator; but we cannot say, as a matter of law, that a reasonably prudent business man might not make the honest mistake of paying out more to free property from a lien than the property would sell for after the lien was extinguished.

2. The holder of the mortgage which was executed by the deceased in her lifetime brought suit against the administrator for the foreclosure of the same, and in the decree were included the sums of \$571.12 for taxes and interest thereon, and \$2,643.88 interest on the promissory note.

It is claimed that in the complaint on foreclosure there was no allegation of payment of taxes, and that the administrator and his counsel, notwithstanding this fact, consented to the taxes being included in the decree. The mortgage provided that in case of foreclosure the mortgagee should be entitled to include in the decree all taxes paid out upon the property. The bill of exceptions shows that proof was made of the amount of taxes so paid, and that the attorneys for the administrator found the same to be correct. It therefore appears that the foreclosure case was tried upon the theory that the complaint contained the necessary allegation as to taxes, and it is too late now to raise the objection for the first time. As the objection, if raised, would have been merely technical, and as the bill of exceptions shows that the taxes were properly included according to the mortgage and the proof, we cannot now say it was negligence in the administrator not to object to the proof of the payment of the taxes because the complaint did not allege such payment. We must presume in support of the judgment that the matter was heard and determined in the lower court upon the theory that the complaint was sufficient and the issue properly before the court. (*Lawrence Nat. Bank v. Kowalsky*, 105 Cal. 43.)

It is claimed that the amount of interest in the decree was

computed according to the terms of the promissory note and not at the legal rate after the first publication of notice of creditors, and that thus the interest was \$409.41 too much, and that the administrator here should be charged with it. This claim is made upon the theory that the estate is insolvent, and that after the first publication of notice to creditors the note and mortgage should have drawn interest at the legal rate and not at the rate specified therein. It is not necessary to decide the question as to whether or not the rate of interest should have been seven per cent after the first publication of notice to creditors. If the estate is insolvent, as claimed by appellants, then, as devisees, they have no interest in the matter, and no creditor has appealed from the order allowing the account. We do not think the amount of the judgment in the foreclosure proceedings can be here attacked except by proof of negligence on the part of the administrator.

The decree was offered in evidence by appellants. It showed that plaintiff, in open court, waived all claim for attorney's fees and all claim to a deficiency judgment. That the court heard evidence and determined that there was due for principal and interest the sum of \$8,715 and \$11.45 costs. The evidence introduced in this record shows that the amount named in the decree was correct. It is not claimed that the property was ever redeemed or that the administrator ever received any money from it in any way. It is not claimed that he acted fraudulently or corruptly. Another answer to the contention as to the interest and taxes amounting to \$980.53 is that appellants are not in a position to complain. If the full amount claimed should be charged to the administrator, there would then not be sufficient on hand to pay the creditors, and appellants would not be entitled to anything. The proof shows that after the foreclosure sale the administrator made arrangements with the plaintiff in the suit, who was the purchaser at the sale, that if he could find a purchaser for the land she would deduct one thousand dollars from the amount due her. That the administrator tried to find such purchaser but could not, and the plaintiff, who purchased the property at foreclosure sale, finally sold it for less than the amount due her. Finally, it is claimed that the administrator did not make any appraisement of the prop-

erty, and was guilty of negligence in not settling up the estate sooner. These grounds could properly have been urged on petition to remove the administrator, but we do not understand that in the absence of proof of loss by such negligence the court could charge the administrator in the final account with damages. The proof shows that the administrator used diligent efforts to procure a purchaser for the land not only up to but after the foreclosure sale. That he procured an agreement from the purchaser at the sale to take one thousand dollars less than the amount due her, and yet could find no purchaser. B. F. H. Odell, one of the appellants, testified that he knew of the efforts of the administrator to sell the land, and that the administrator requested him to assist in finding a purchaser. That he was aware that the administrator was making diligent efforts to sell the land, but that, owing to the conditions of the real estate market, he could not find a purchaser. That he did not expect to get anything out of the real estate. There is not in the record any evidence that the real estate could ever during the administration of the estate have been sold for even enough to pay off the mortgage upon it. It would then have been a useless expense for the administrator to have appraised it. The court below, as a penalty for the delay in the administration, charged the administrator with interest on the balance of \$154.42 in his hands at seven per cent per annum, with annual rests, until the account was allowed, the amount being \$80.48. In this the court below was justified. There are no other points requiring special notice.

We advise that the order be affirmed.

Chipman, C., and Haynes, C., concurred.

For the reasons given in the foregoing opinion the order is affirmed. Harrison, J., Garoutte, J., Van Dyke, J.

[L. A. No. 540. Department One.—August 28, 1899.]

E. H. CRAWFORD et al., Respondents, v. TRANSATLANTIC FIRE INSURANCE COMPANY, Appellant.

FIRE INSURANCE—DELIVERY OF POLICY AFTER FIRE—PRIOR AGREEMENT FOR EFFECTIVE POLICY. A fire insurance policy may be delivered after the occurrence of a fire, if it purports to take effect prior to occurrence, and is the memorial of a prior parol contract for such a policy agreed to in its essentials, and which the parties intended should take effect as stated in the policy. In such case, it seems that the policy may have taken effect without actual delivery to the insured or his agent.

ID.—ABSENCE OF PRIOR AGREEMENT—NONLIABILITY FOR PREMIUM.—In the absence of such a prior agreement as would bind the insurance company and render the insured person liable for the premium, the delivery of the policy after the building had been destroyed by fire, to the knowledge of the parties, could not give any effect to the instrument.

ID.—ACTION UPON POLICY—EVIDENCE—ACTS AND DECLARATIONS OF AGENTS—RES GESTAE.—In an action upon such policy, all of the acts and declarations of the agents of the fire insurance company which might characterize their intent while they were engaged in the business of the insurance, and until the delivery of the policy, are admissible against the insurance company as part of the *res gestae*.

ID.—SUBSEQUENT NARRATIONS—HEARSAY.—The declarations of the agents of the defendant, made at a time subsequent to the delivery of the policy or when they were not acting for the defendant in any business connected therewith, and which were not part of the *res gestae*, but are mere narration or illustration of their past conduct, are incompetent hearsay.

APPEAL from a judgment of the Superior Court of San Luis Obispo County and from an order denying a new trial. E. P. Unangst, Judge.

The facts are stated in the opinion.

W. S. Goodfellow, and Wilcoxon & Bouldin, for Appellant.

There is no proof that Barrett and Roberts were authorized to make any agreement of insurance, except by a duly executed and delivered policy, and such a policy could not take effect by delivery after the fire. (Civ. Code, sec. 1626; *Armstrong v. State Ins. Co.*, 61 Iowa, 212, 215; *O'Brien v.*

New Zealand Ins. Co., 108 Cal. 227; *Stebbins v. Lancashire Ins. Co.*, 60 N. H. 65; *Blake v. Hamburg-Bremen Fire Ins. Co.*, 67 Tex. 160; 60 Am. Rep. 15.) The admissions of the agents outside of the scope of their authority, made subsequent to the transaction to which the admissions related, were incompetent. (*Wicktorwitz v. Farmer's Ins. Co.*, 31 Or. 569; *Mechem on Agency*, secs. 714-16; *First Baptist Church v. Brooklyn etc. Ins. Co.*, 28 N. Y. 153, 159, 160; *Birch v. Hale*, 99 Cal. 299; *Beasley v. San Jose Fruit-Packing Co.*, 92 Cal. 388; *Walker v. Farmer's Ins. Co.*, 51 Iowa, 679.)

W. H. Spencer, for Respondents.

If the instructions given to the jury, at the request of plaintiffs, to which no objection was urged, were law, the judgment should be affirmed.

BRITT, C.—Action on a policy of fire insurance, which in terms purports to be the contract of defendant, and to insure a certain stable building, the property of plaintiff Crawford, to the amount of one thousand dollars, for the period of one year, commencing at noon of May 2, 1897. The defense is that the instrument was not executed by defendant, and never took effect as its contract. For the purposes of the trial the parties stipulated that from April 1, 1897, to May 15, 1897, one Roberts and one Barrett “were and each of them was the agent of the defendant, and authorized to execute said policy, if it was executed.” It appeared in evidence for plaintiffs that said Roberts was a traveling agent for defendant, and said Barrett was its local agent at the town of San Luis Obispo, where said building was situated; that as the result of some oral negotiations between Crawford and both of said agents on April 30, 1897, Roberts on that day prepared and signed said policy and left it with Barrett, Crawford having agreed to accept the same and pay the premium thereon; on the following day, May 1st, Barrett sought Crawford for the purpose of delivering the policy, but failing to find him, Barrett kept the document over May 2d, which was a Sunday, and while it was so in his possession, on Sunday night, the building was destroyed by fire; on May 3d, after the fire, Barrett delivered the policy to a certain bank, to be held by the bank as Crawford's agent. A few days later Crawford offered to pay the premium on the pol-

icy to said agents, but they declined to receive it. On behalf of defendant, there was evidence tending to show that Crawford refused the proposal of said agents to insure the building and to issue said policy, and that the same was prepared without his consent, Barrett expecting to induce him to accept it; and that the delivery to the bank after the fire was (it seems) but provisional, pending other arrangements. There was a verdict and judgment for plaintiffs.

The main question for determination was whether all the acts of said agents, taken together, amounted to an execution of the policy, so that it became obligatory on the defendant. If the policy—as the evidence for plaintiffs tended to show—was the memorial of a contract which in its essentials had been agreed upon by parol before the fire, and which the parties intended should take effect according to its terms on the 2d of May at noon, then certainly the subsequent delivery was sufficient to make the defendant liable on the instrument; its liability thereon probably attached even without actual delivery to the insured or his agent. (*Lightbody v. North American Ins. Co.*, 23 Wend. 18; *Davenport v. Peoria etc. Ins. Co.*, 17 Iowa, 176; *Franklin Insurance Co. v. Colt*, 20 Wall. 560; *Yonge v. Equitable etc. Soc.*, 30 Fed Rep. 902.) If, however—as the evidence for defendant tended to show—there had been before the fire no agreement that defendant should insure the building and issue its policy accordingly, such an agreement as would have made Crawford liable for the premium, then it is equally plain that delivery of the policy after the building had been destroyed, to the knowledge of the parties, could not impart to the instrument any effect whatever. (Civ. Code, secs. 2527, 2528; *Clark v. Insurance Co.*, 89 Me. 26; *People v. Dimick*, 107 N. Y. 13.)

It was, therefore, important evidence for the plaintiffs if they could show that defendant considered or admitted at any time that the contract was complete and the risk had attached. For this purpose all the acts and declarations of either Roberts or Barrett which might characterize or explain their intent while they were engaged in the business with Crawford and until the delivery of the policy to the bank, were part of the *res gestae*, and hence admissible evidence against the defendant. Of this nature, for instance, was the testimony of the plaintiff Bush, who was named in the policy

as payee of the insurance in case of loss, that Barrett said to him at the time he handed the policy to the bank, "You are a thousand dollars better off than you thought; here is a policy for a thousand dollars just put on your stable." Testimony such as this was plainly competent.

But the plaintiffs went further; the court allowed them, over the objection of defendant, to prove as part of their case in chief a declaration made by said Roberts at a time subsequent to the delivery of the policy and when he was not acting for defendant in any business connected therewith, that he "had received a dispatch from his company to adjust a loss on Crawford's stable, and that he had found out since . . . that his policy didn't cover." Evidence was also admitted, over like objection, of a statement made by Barrett, on the morning following the fire, that "he had issued a policy for a thousand dollars on that building to Mr. Crawford a few days before." By these rulings and one or two others of similar character the plaintiffs were allowed to place before the jury evidence of admissions by defendant's agents made, not as part of the transaction looking to the execution of the policy, nor while discharging any duty of their agency pertaining to their treaty with Crawford, but as mere narration or illustration of their past conduct. Such evidence was only hearsay and was incompetent. (*Beasley v. San Jose Fruit Packing Co.*, 92 Cal. 388; *Dean v. Aetna Life Ins. Co.*, 62 N. Y. 642; *Insurance Co. v. Mahone*, 21 Wall. 152; *Walker v. Farmers' etc. Ins. Co.*, 51 Iowa, 682.) It was material to the issue pending, and for the error in its admission the judgment and order denying a new trial should be reversed.

Gray, C., and Cooper, C., concurred.

For the reasons given in the foregoing opinion the judgment and order denying a new trial are reversed.

Harrison, J., Van Dyke, J., Garoutte, J.

[L. A. No. 560. Department One.—August 28, 1899.]

§18

W. RIGBY, JR., Appellant, v. T. S. C. LOWE, Respondent.

FOREIGN CORPORATION—POWER OF LOCAL MANAGER—ASSIGNMENT OF CHECK FOR COLLECTION.—The power of a local manager of a foreign corporation to sell chattels and receive the price, with a special direction from the corporation to collect a dishonored check given to the corporation, upon a sale of goods by the local manager, does not carry with it the power to assign such check to another person for collection against the drawer of the check. And the person to whom such manager assumes to assign the check cannot maintain an action thereon in virtue of such assignment.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order denying a new trial. Waldo M. York, Judge.

The facts are stated in the opinion.

W. Rigby, and Leslie R. Hewitt, for Appellant.

Miller & Brown, for Respondent.

BRITT, C.—The General Electric Company is a corporation and had, at the time of the transactions presently to be mentioned, its main office and place of business at Schenectady, in the state of New York; it had also an office at the city of San Francisco in this state in charge of one Thomas Addison, who was its "local or district manager" on the Pacific coast. Said corporation sold merchandise of some sort to a certain railroad company at Los Angeles, California, of which the defendant, T. S. C. Lowe, was president; the goods thus sold were shipped, and bills for the same were rendered to Lowe, from the said San Francisco office. Thereupon Lowe drew his check for the amount of the bills—four hundred and twelve dollars and sixteen cents—in favor of said General Electric Company and (it seems) sent the same to the payee at Schenectady. Payment of the check was refused for want of funds by the drawee therein named, and after protest thereof the electric company forwarded it to said Addison at San Francisco for collection. Said company was ac-

customed to collect through its main office at Schenectady some of its bills for goods sold in California, and others—probably the majority—were collected at the San Francisco office. Addison indorsed the check as follows: "General Electric Company—Thomas Addison, district manager," and delivered it to Rigby, the plaintiff here, with instructions to sue thereon. Accordingly, plaintiff brought this action to enforce the liability of Lowe as drawer of said check. The court found that the assignment of the check attempted by Addison to plaintiff was in excess of Addison's authority as agent for the electric company, and that plaintiff is not the owner or holder thereof, and on this ground denied a recovery on the check.

The foregoing statement comprises the substance of all the evidence at the trial touching the power of Addison to transfer the check to plaintiff, and, consequently, the right of the latter to maintain the action thereon. It does not follow, as matter of law, from the mere circumstance that Addison was the company's "local or district manager," that he possessed the power to assign his principal's chose in action; that designation of his position implies some measure of inferiority to a distant or general authority. Obviously, the scope of the powers of such an agent must depend on the character and necessities of the business, and the degree or extent of control over the same committed to him by the principal. (See *Mechem on Agency*, secs. 395, 398.) There is here extremely scant evidence of the nature of the business carried on by the General Electric Company; it seems, however, to have consisted in selling tangible chattels of some kind, and we may, perhaps conjecture that Addison had the management of such sales in this state; if so, the extent of his implied authority to deal with the proceeds of a sale was "to receive the price." (Civ. Code, secs. 2019, 2325.) He had also been specially directed to collect on this check. Therefore, viewing the evidence in the light most favorable to plaintiff, it shows no more than that Addison had full power to collect in the ordinary way (by suit, if necessary, in the name of his principal) the demands of the electric company against debtors in his district; but this power did not of itself include the right to transfer any of such demands to a third person, although for the purpose only of qualifying him to sue on the same. That would result in

taking the collection from Addison, with whom it was lodged by the company, and placing its control in the hands of a stranger. (*Dingley v. McDonald*, 124 Cal. 90.) The cases relied on by plaintiff (*McKiernan v. Lenzen*, 56 Cal. 61; *Tuller v. Arnold*, 98 Cal. 522; *Greig v. Riordan*, 99 Cal. 316) were instances of an assignment by the general managing agent of a corporation, who was shown expressly or by fair implication to have a control of its affairs virtually coextensive with its ordinary business. No such authority was proved to reside in Mr. Addison. The judgment and order denying a new trial should be affirmed.

Haynes, C., and Cooper, C., concurred.

For the reasons given in the foregoing opinion the judgment and order denying a new trial are affirmed.

Van Dyke, J., Garoutte, J., Harrison, J.

[S. F. No. 1890. Department One.—Sept. 1, 1899.]

A. C. KUHN et al., Respondents, v. CHARLES C. SMITH,
Appellant.

LANDLORD AND TENANT—LEASE FOR YEARS—DUTY OF TENANT AT EXPIRATION OF TERM.—A tenant in possession under a lease for a fixed term, is a tenant for years, and is in duty bound, at the expiration of his term, to surrender possession without notice of any kind.

ID.—LEASE OF AGRICULTURAL LAND—HOLDING OVER—TENANCY AT WILL—NOTICE TO QUIT—EJECTMENT.—The mere holding over by a tenant under a lease of agricultural lands, after the expiration of the term fixed therein, for a period of six weeks, without consent of the owner, though without previous demand for possession, does not constitute a tenancy at will, or entitle the tenant to any notice to cut off his rights, before the bringing of an action of ejectment against him by the owner.

APPEAL from a judgment of the Superior Court of Santa Clara County. A. S. Kittredge, Judge.

The pleadings and findings disclose that on the thirteenth day of December, 1897, plaintiffs executed a written lease of a tract of eighteen thousand two hundred and fifteen acres of agricultural land in the Rancho Yerba Buena in Santa Clara

county to the defendant, for a fixed term ending October 1, 1898; that the lease did not provide expressly for a re-entry; that defendant held possession during the term, and continued to hold possession thereafter without any further agreement or arrangement, until the fifteenth day of November, 1897, when plaintiffs served a written demand for possession, which demand was refused; and that neither of the plaintiffs ever said or did anything to allow the defendant to occupy the premises after the term. Plaintiffs brought this action of ejectment December 16, 1898.

John H. Moore, and Charles Clarke, for Appellant.

The delay of six weeks in allowing the tenant of agricultural lands to hold over, during which preparations would naturally be made for a new crop, under a lease not providing for a re-entry, should be held to create a tenancy at will, requiring one month's notice to terminate it. (Civ. Code, secs. 789, 790.) The phrase "tenants at will," under our statute, includes "tenants by sufferance." (Civ. Code, sec. 761; code commissioners' note; Deering's Annotated Civ. Code, note to sec. 761.)

S. F. Leib, for respondents.

Defendant was not a tenant at will. Tenancy at will depends upon express contract. (1 Bouvier's Law Dictionary, 692; *Blum v. Robertson*, 24 Cal. 144, 145.) The holding over not having continued for sixty days no notice was required by the statute. (Code Civ. Proc., sec. 1161, subd. 2.) No notice is required before bringing ejectment against a tenant holding over a fixed term without contract, by mere sufferance for a short period. (1 Bouvier's Law Dictionary, 629, tit. "Estate at Sufferance"; *McLeran v. Benton*, 73 Cal. 340; 2 Am. St. Rep. 814; *McKissick v. Ashby*, 98 Cal. 422; *Perine v. Teague* 66 Cal. 446; *Canning v. Fibush*, 77 Cal. 196; *Lee Chuck v. Quan Wo Chong Co.*, 91 Cal. 597.) The defendant has denied plaintiff's title, and has not pleaded a tenancy at will; and is not entitled to rely upon a notice to quit, under the pleadings. (*Bolton v. Landers*, 27 Cal. 104; *McCarthy v. Brown*, 113 Cal. 15; *Hihn v. Fleckner*, 106 Cal. 95; *Perine v. Teague*, *supra*; *Payne v. Treadwell*, 16 Cal. 244.)

GAROUTTE, J.—This is an action of ejectment. Plaintiffs, by writing, leased certain agricultural lands to defendant for a fixed, definite period—about ten months. Upon the expiration of the lease defendant refused to give up possession, and this action was commenced. Plaintiffs commenced the action some six weeks after the lease had expired, and defendant now rests his right of possession upon the claim that after the expiration of the lease he became a tenant at will, and by virtue of such tenancy he was entitled to a notice of thirty days (Code Civ. Proc., sec. 1162) before action could be brought to eject him. In other words, his only defense is that the action is prematurely brought. There is nothing whatever in the claim made. The defendant was not a tenant at will. Under his lease he was a tenant for years, and upon the expiration of his term it was his duty to move without notice. He had no rights of any kind which demanded a notice in writing in order that they might be cut off.

It is not the law of this state that a tenant who remains in possession, perchance a single day after the expiration of his lease, thereby becomes a tenant at will, and must be served with a thirty-day notice before he may be ejected. Upon a similar state of facts it is said in *McKissick v. Ashby*, 98 Cal. 425: "Under the facts stated, we think that plaintiff had a right to re-enter when the term expired and to maintain an action for possession without previous notice or demand." It is also said in *Canning v. Fibush*, 77 Cal. 196: "And inasmuch as the lease expired by its own limitation there was no necessity of a notice to terminate it. . . . This being the case, we do not see how the defendants had any right to continue in possession, and, if they had no such right, why the plaintiff should not recover the premises, with damages for the detention." In *Perine v. Teague*, 66 Cal. 446, the syllabus is as follows: "A tenant who enters and continues in possession of the demised premises under a written lease until the expiration of the term, does not thereafter become a tenant at will by refusing to surrender that possession and by holding over without the consent of the lessor."

For the foregoing reasons the judgment is affirmed.

Van Dyke, J., and Harrison, J., concurred.

[L. A. No. 593—Department One.—Sept. 1, 1899.]

DAVID E. GRIFFITH, Appellant, v. M. LEWIN, Administrator, et cetera, Respondent.

ESTATES OF DECEASED PERSONS—ACTION UPON REJECTED NOTE—EVIDENCE—NONPAYMENT—PRIMA FACIE CASE—BURDEN OF PROOF.—In an action against the administrator of a deceased person upon a rejected note a *prima facie* case of nonpayment of the note is made by the introduction of the note in evidence, with the indorsements thereon, and proof of the signature of the decedent thereto; and of the due presentation of the claim and its rejection; and the burden of proof was thereby cast upon the defendant to prove by competent evidence that the note had been paid; or to raise a legal presumption of payment sufficient to rebut the *prima facie* case made by the plaintiff.

ID.—PRIOR AND SUBSEQUENT NOTES SECURED BY MORTGAGE—PRESUMPTIONS.—Mere proof that a note secured by mortgage had been executed by the deceased prior to the note in suit, and that a subsequent note and mortgage had been executed about a year and a half thereafter, for about the amount then due on the old mortgage and the note in suit, without any evidence that the new note and mortgage was in payment of the old, or as to the consideration thereof, or any evidence that either of the mortgages had any connection with the note in suit, cannot raise any presumption of payment of the note sued upon; but it must be presumed that if the note had been paid, it would have been delivered up, and it being found at the death of the decedent in possession of the plaintiff, it must be presumed that it had not been paid by the decedent.

ID.—SUBSEQUENT PAYMENTS BY DECEASED.—The note in suit having been indorsed with numerous payments in the handwriting of the deceased subsequently to the execution of the last mortgage, it cannot be presumed that the note was included in the last mortgage and settled thereby in the ordinary course of business.

ID.—RECEIPTS FOR MONEY NOT INDORSED.—Receipts given to the plaintiff by the deceased for money not indorsed on the note, should be such in their contents as to raise a presumption that the money included therein was money paid on the note.

APPEAL from a judgment of the Superior Court of San Luis Obispo County and from an order denying a new trial.
E. P. Unangst, Judge.

The facts are stated in the opinion.

Graves & Graves, for Appellant.

The production of the note in evidence by the plaintiff was sufficient evidence of ownership and nonpayment to entitle plaintiff to recover, in the absence of proof of payment, the burden of which was upon the defendant. (*Turner v. Turner*, 79 Cal. 565; *Farmers' etc. Bank v. Christensen*, 51 Cal. 571; *Perot v. Cooper*, 17 Colo. 80; 31 Am. St. Rep. 258.)

F. A. Dorn, and S. M. Swinnerton, for Respondent.

The burden is on the plaintiff to prove by a preponderance of evidence the allegation of nonpayment, when denied. (*Frisch v. Caler*, 21 Cal. 71; *Turner v. Turner*, 79 Cal. 565; *Davanay v. Eggenhoff*, 43 Cal. 395; *Scroufe v. Clay*, 71 Cal. 123; *Wise v. Hogan*, 77 Cal. 184; *Notman v. Green*, 90 Cal. 172; *Barney v. Vigoreaux*, 92 Cal. 631; *Bank of Shasta v. Boyd*, 99 Cal. 604; *Ryan v. Holliday*, 110 Cal. 335; *Wetmore v. San Francisco*, 44 Cal. 294.) Where there is some evidence of payment, the burden is with plaintiff on the issue of nonpayment, on the submission of the cause. (*Adams v. Slate*, 87 Ind. 576; *Grant v. Lexington Ins. Co.*, 5 Ind. 23; 61 Am. Dec. 73.) Any presumption of nonpayment from production of the note is met and dispelled by the presumption that the ordinary course of business has been followed. (Code Civ. Proc., sec. 1963, subd. 20; *Savings etc. Soc. v. Burnett*, 106 Cal. 514.) A presumption may be rebutted by a countervailing presumption. (*Adams v. State*, *supra*; *Grant v. Lexington Ins. Co.*, *supra*; 19 Am. & Eng. Ency. of Law, 40, 52, 79.) Where "the question appears to be one of presumption, inference, probability, and conjecture, under such circumstances we will not disturb the court's best judgment as to the truth of the fact." (*Mills v. Home Ben. Life Assn.*, 105 Cal. 232, 235.)

COOPER, C.—Action to recover on a promissory note. Judgment for defendant. Plaintiff appeals from the judgment and from an order denying his motion for a new trial. The case is here on the judgment-roll and a bill of exceptions. The court below found that the note had been fully paid, and the plaintiff contends that this finding is not supported by the evidence and we think the contention will have to be sustained.

On May 22, 1893, John M. Hughes, now deceased, made

his promissory note to plaintiff for \$1,174.35, due one year after date, with interest thereon until paid. On September 30, 1895, the said Hughes died, and defendant was in October, 1895, duly appointed administrator of his estate. In October, 1895, publication of notice to creditors was made by defendant as such administrator. The plaintiff in due time made out and presented his claim against said estate upon the said promissory note, which claim was rejected by the defendant.

The complaint contains a copy of the said note, alleges the due presentation of the claim and its rejection by defendant, and is verified. The answer, which is also verified, alleges that defendant has no information or belief as to the making and delivering of the note, and upon that ground denies that it was made and delivered as set forth in the complaint.

The answer also denies that the note has not been paid, and denies the presentation of the claim to the defendant. Plaintiff introduced in evidence the promissory note with the indorsements thereon, proved the signature of deceased thereto, and the due presentation of the claim and its rejection, and rested. This made out a *prima facie* case of nonpayment. (*Farmers' etc. Bank v. Christensen*, 51 Cal. 572; *Turner v. Turner*, 79 Cal. 566; *Ritter v. Schenk*, 101 Ill. 389.)

It being thus shown that the note was not paid, the burden was cast upon defendant to prove by competent evidence that it had been paid. The evidence on the part of the plaintiff raised a presumption of nonpayment, which in law entitled him to recover. The evidence on the part of the defendant must have been such, whether direct or by raising legal presumptions, as to rebut the *prima facie* case made by plaintiff. The only evidence offered by defendant is to the effect that on October 5, 1894, the deceased executed and delivered to plaintiff his promissory note secured by mortgage for \$4,543.32. That on said last named date there was due upon an old note and mortgage, executed by deceased to this plaintiff in 1891, the sum of about \$3,200 or \$3,300. There was no proof that the note and mortgage of October 5, 1894, was in payment of the old note and mortgage of 1891, and no evidence as to the consideration for the same, and it was not shown that either of the mortgages had any connection in any way with the note in controversy here.

Counsel for defendant in their brief, in a very ingenious manner, undertake to show by calculation that the note and mortgage of October 5, 1894, were for about the amount due on the old mortgage of 1891 and the note in this case, and insist that the presumption is that the note and mortgage of October 5, 1894, was in full settlement of the note in this suit. We do not think the law indulges in such imaginary presumptions. It is said we must presume "that the ordinary course of business has been followed." If so, we must presume that if deceased in his lifetime ever paid the note in this case that it was delivered up to him. If it had been delivered up to him we would have to presume that it had been paid (Code Civ. Proc., sec. 1963, subd. 9) ; but, as it was not delivered up, but was at his death in the possession of plaintiff, we must presume that it has not been paid. A promissory note in the possession of the payee after the death of the maker is an instrument of too solemn a nature to be adjudged as having been fully paid in the absence of proof or circumstances which raise a legal presumption of its payment. The uncontradicted evidence shows that at the time of the death of Hughes the note was in the possession of plaintiff's agent, Mr. Brown, with whom it had been since 1893. During the years 1894 and 1895 Mr. Brown made some twenty indorsements of payments in his own handwriting, amounting to over \$600. These payments were all made and indorsed on the note after the making of the note and mortgage of October 5, 1894. It would not be considered the ordinary course of business for the payee of a note to keep it in his possession after it had been paid. It would certainly not be in the ordinary course of business for the maker of a note, after having once paid it, to continue making payments upon it for two years thereafter. The plaintiff was not permitted to testify against the estate of deceased, and the lips of deceased had been closed by death. The note, therefore, in the possession of plaintiff raises a presumption of nonpayment which, in the absence of testimony or legal presumptions from facts established by the testimony, entitles him to judgment.

The receipts offered in evidence by defendant are not described in such manner in the bill of exceptions as to enable us to even guess at what they were for. The date is not given

nor the contents of the receipts, nor any single fact from which a presumption can arise that the receipts were for money paid on the note. The statement shows that the defendant introduced in evidence "receipts aggregating \$310.-50, none of which receipts correspond in date or amount with the indorsements on the note."

Even if the amount was for money actually paid by deceased to be credited on the note, it would not change the result here because the amount is not sufficient to show that the note has been fully paid.

We advise that the judgment and order be reversed.

Haynes, C., and Chipman, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are reversed.

Van Dyke, J., Garoutte, J., Harrison, J.

[L. A. No. 468. Department One.—September 1, 1899.]

I. ISAAC IRWIN, Appellant, v. THOMAS C. EXTON, et al, Respondents.

MUNICIPAL CORPORATIONS—WATERWORKS—VOID BONDS—CONTROL OF FUNDS RAISED BY TAXATION.—Money raised by taxation toward the payment of void municipal bonds voted for the construction of waterworks by the city, is free from the direction of the statute, and need not be kept in a water-bond fund; but, if free from the claims of the taxpayers who paid it, it may be transferred by the city authorities to the general fund, and may be used by them in proper expenditures to secure plans and estimates of cost from an engineer for proposed waterworks, before submitting the question of bonds again to the people.

ID.—INJUNCTION—SUIT BY RESIDENT PROPERTY-HOLDER.—An elector and resident property-holder of the city, who does not seek to recover any part of the taxes paid to the city upon void water-bonds, cannot maintain a suit in equity for an injunction to restrain the city authorities from transferring the money raised by taxation therefor to another fund, to be used for a lawful purpose by the city.

ID.—REMEDY AT LAW FOR PERSONS AGGRIEVED.—A court of equity will not restrain the officers of a municipality from doing an act which

will not injure the complainant and in a matter where there is an adequate remedy at law given to persons aggrieved.

APPEAL from a judgment of the Superior Court of San Diego County. J. W. Hughes, Judge.

The facts are stated in the opinion.

Eugene Daney, for Appellant.

The city is estopped from claiming that the bonds are void, or from using the money raised to pay them for any other purpose. (4 Thompson on Corporations, secs. 5246, 5247; 2 Pomeroy's Equity Jurisprudence, secs. 804, 815, 819; *Spokane City Ry. Co. v. Spokane Falls*, 6 Wash. 521.) The taxes having been in fact illegally collected can be recovered back by the taxpayers. (*Newman v. Supervisors*, 45 N. Y. 687; *Chapman v. Brooklyn*, 40 N. Y. 379.) Such taxes do not come under the rule of voluntary payments which cannot be recovered back. (*Kerr v. Butz*, 34 Ill. App. 220.) Injunction will lie to restrain the disbursement of taxes illegally collected. (*Douglas v. Placerville*, 18 Cal. 643.)

W. T. McNeally, for Respondents.

The tax-payers cannot recover back the money; and the trustees may expend in accordance with the wishes of the tax-payers, as nearly as possible. (*Atchison v. State*, 34 Kan. 379.) The tax-payers paid the money voluntarily, and are estopped from claiming that it was illegally collected. (*Detroit v. Martin*, 34 Mich. 170; 22 Am. Rep. 512; Cooley on Taxation, 19, 809; 18 Am. & Eng. Ency. of Law, 220; *Bucknall v. Story*, 46 Cal. 589; 13 Am. Rep. 220; *Maxwell v. San Luis Obispo*, 71 Cal. 467; *Garrison v. Tillinghast*, 18 Cal. 404.) The moneys were kept until the claims of tax-payers are barred by the statute of limitations in an amount exceeding the expenditure proposed. The statute of limitations runs in such a case. (Cooley on Taxation, 807; *Callanan v. Madison County*, 45 Iowa, 561; Dillon on Municipal Corporations, sec. 946.)

CHIPMAN, C.—Oceanside is a city of the sixth class; on May 8, 1894, it voted thirty thousand dollars of bonds, under the act of March 19, 1889 (Stats. 1889, p. 399), and the acts

amendatory thereof (Stats. 1891, pp. 84, 132, and Stats. 1893, p. 61), for the purpose of acquiring water rights and the construction of water-works to supply the city and its inhabitants with water; bonds were printed but were never executed or sold, and it is conceded by both parties that they are void and therefore cannot be legally issued. After the election the city proceeded to levy an annual tax, under the provisions of the act, to raise the funds with which to pay the interest on the bonds and provide a sinking fund to pay the principal at maturity; as the result of said levy it is stipulated that "there is now in the city treasury . . . for taxes collected on account of said bonds, . . . in the fund known as water bond fund No. 2, about the sum of seven thousand nine hundred and ninety-nine dollars"; and that, unless restrained, defendants "will transfer from said water bond fund No. 2, to the water-works improvement fund, or to some other fund, moneys of said water bond fund No. 2, and will pay and order paid out of said moneys now in or hereafter taken from said last-mentioned fund, for the services of the engineer employed under the aforesaid resolutions"—i. e., certain resolution of the said defendants—the sum of eight hundred and forty dollars; plaintiff is an elector and resident property-holder of said city but whether he paid into the treasury any of said sum collected as taxes does not appear; he is not seeking to recover any of this fund as paid by him; he seeks only to restrain defendants from transferring any of the money now in the said water bond fund to any other fund and to restrain defendants from using any of said money for the purposes threatened by them. The court entered judgment for defendants denying the injunction, and the appeal is from this judgment.

Counsel discuss many propositions which we do not deem it necessary to consider. The validity of the bond issue is not necessarily raised by the pleadings and we do not pass upon that question. Both parties, however, concede that the bonds are invalid, and for the purposes of this case they will be so regarded. Appellant devotes much attention to the provisions of the statutes relating to the transfer by the municipal authorities of money under their control from one fund to another fund; and also to certain requirements of the municipal corporation act by which it is claimed that

taxes collected to pay the principal and interest on bonds "shall be kept in the treasury as a separate fund to be inviolably appropriated to the payment of the principal and interest of such indebtedness." We cannot regard these provisions of the statute as involved. Appellant contends, and respondents concede, that there are no legal bonds in existence for many reasons; and, among others, that the initial proceedings of defendants were not in conformity with law, and no authority exists for creating a bonded debt. This being so, we cannot see how there can be a water bond fund where the taxes collected under these illegal proceedings can be impounded and held indefinitely. The statute provides for holding inviolate money paid into the treasury to meet the interest and principal of valid bonds, not bonds that have no legal existence. The trustees of the city may have entered these taxes on the books of the city as to the credit of a water bond fund, but, as the proceedings leading up to the collection of this money were void, and as the purpose for which the money was paid has failed, it seems to us that it is held by the city authorities freed from any of the directions of the statute under which it was collected, and is to be treated as any other money coming into their hands for some lawful purpose, but which cannot be used for the particular object contemplated when it was paid into the treasury. The money either belongs to the persons who paid it, or, if it cannot be recovered back by them, it may be carried to the general fund of the city and may be used for any of the purposes for which any other money in that fund may be used. Appellant cites the case of *Kerr v. Butz*, 34 Ill. App. 220, to show that these payments were not voluntary and that the city holds the money as bailee, to be paid to the tax-payer on demand. We are not called upon in this action to decide whether this money may be recovered back by the tax-payers who paid it; they are not asking it and may never do so; and the evidence is not directed specially to that question, and, to express any opinion upon it, would bind nobody. We cannot see, however, in what way plaintiff would be injured whatever may happen. He paid none of the money, so far as we know, and has no

claim upon it; if it is paid back it does not injure him, and if it is retained and used, presumably he will be benefited in common with other property-holders. We do not think that the equity powers of the court should be interposed to restrain the officers of a municipality from doing an act which, if done, will not injure the complainant and in a matter where there is an adequate remedy at law given to the persons really aggrieved. Appellant's action amounts simply to a benevolent effort on his part to tie up this money against the day when the tax-payers who paid may claim their own.

We cannot believe it to be within the legitimate powers of an equity court to aid in such a purpose. If defendants proposed to use this money for some unlawful object, that is, for some object for which they could not use the funds of the city, plaintiff might maintain the action upon the principles laid down in *Winn v. Shaw*, 87 Cal. 631, but no such case is presented. The city has the right to use its general fund in proper expenditures to secure plans for proposed water works. The act relied upon by appellants provides, and he insists, that, before the city can submit to the voters the question of issuing bonds for this purpose, there must be plans and estimates of cost for the information of the voters. For authority to employ an engineer, as is proposed, see act of March 13, 1883 (Stats. 1883, p. 84.) section 862, subdivision 3.

The proposed use of the money is not, therefore, in excess of the powers of the city authorities. In no view of the case can we see that plaintiff is entitled to the relief asked, and for this reason it is advised that the judgment be affirmed.

Britt, C., and Haynes, C., concurred.

For the reasons given in the foregoing opinion the judgment is affirmed. Van Dyke, J., Garoutte, J., Harrison, J.

[S. F. No. 995. Department Two.—September 5, 1899.]

PATRICK HENNESEY, Respondent, v. HENRY BINGHAM, Appellant.

NEGLIGENCE—SUPPORT OF VERDICT—CONFLICTING EVIDENCE—PRESUMPTION UPON APPEAL.—In an action to recover damages for personal injuries alleged to have been caused by the negligence of the defendant, where the evidence is conflicting it must be presumed upon appeal from a judgment for the plaintiff that the jury believed those witnesses whose testimony was favorable to the plaintiff.

ID.—ASSUMPTION OF RISK BY SERVANT—QUESTION FOR JURY—REFUSAL TO INSTRUCT FOR DEFENDANT.—Where the jury were warranted in finding from the evidence that the mode adopted by the defendant in carrying on the work in which plaintiff was employed was unusually and unnecessarily hazardous, and that in the hurry and noise of the work the warning given was insufficient to protect the workmen from dangers attending the work, the question whether the plaintiff, by accepting the employment, assumed the risk of the injury suffered, is for the jury to determine, and it was proper to refuse to instruct them to find for the defendant.

ID.—DUTY OF MASTER TO PROVIDE SAFE PLACE—FORMER EXPERIENCE OF SAFETY—QUESTION FOR JURY.—It is the duty of a master to use due diligence to provide his servant with a safe place in which to do his work. Former experience of safety may have some bearing upon the question as to whether he has taken the proper precautions, but its value is for the jury to determine, and it is not a proper basis of an instruction to find for the defendant.

ID.—NEGLIGENCE, WHEN A QUESTION FOR JURY.—When different conclusions as to negligence can reasonably be drawn from the admitted facts, the inference as to the ultimate fact is within the province of the jury, though the facts are undisputed; and it is not proper for the court to instruct the jury as to which inference is to be adopted by them.

ID.—MISLEADING INSTRUCTION—SECURITY OF DEFENDANT BY WARNING FROM FELLOW-SERVANT—ASSUMPTION OF UNUSUAL RISK—QUESTIONS FOR JURY.—A requested instruction to find for the defendant, if the jury should find that plaintiff accepted the employment with the understanding that his safety was to be secured by the giving of a warning required to be given by a competent fellow-servant, and such further care on his part as should be necessary, is misleading, in not submitting to the jury the questions of fact raised by the evidence whether the defendant was not subjected to unusual risk at the time of the injury, and whether, under the circumstances, the defendant understood and had the right to believe that plaintiff knew and assumed the unusual risk.

ID.—OBJECT OF WARNING—NEGLECT OF FELLOW-SERVANT—NEGLECT OF MASTER TO PROVIDE SAFE PLACE.—Under a warning provided by the master as additional security to the workmen from the ordinary risks of accident, in a hazardous employment conducted by the master with ordinary care, the employer is not protected by the neglect of the fellow-servant of the plaintiff to give adequate warning, if the master has contributed to the injury by failure on his part to use ordinary care in the mode of doing the work, by which he has neglected to provide a safe place for his workmen, and subjected them to unusual risks not assumed by them, when they accepted the employment, in which case he cannot evade responsibility for his duties by putting them upon a fellow-servant.

ID.—EVIDENCE—CUSTOM AMONG STEVEDORES IN HANDLING LUMBER.—Where the plaintiff was an experienced stevedore employed by the defendant in handling lumber, lowered into the hold of a vessel, and was injured by the slipping of lumber from an unsecured end of a lowered box, which bounded upon him, evidence for the defendant is admissible to show what was the custom of stevedores in handling such lumber, and what were the respective duties of the workmen engaged in the work, and especially the duties of the hatchman and other servants engaged in lowering the freight; and such evidence is relevant and material as tending to show what care was taken by the defendant in the work, and also what risks the plaintiff assumed by the employment.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. John Hunt, Judge.

The facts are stated in the opinion of the court.

Van Ness & Redman, for Appellant.

If the hatchman failed to give warning, it was the negligence of a fellow-servant, for which defendant is not responsible, and the question of safe place is not involved in such a case. (Civ. Code, sec. 1976; *Hermann v. Port Blakely Mill Co.*, 71 Fed. Rep. 853; *Davis v. Southern Pac. Co.*, 98 Cal. 13, 19; *Ocean S. S. Co. v. Cheney*, 86 Ga. 278; *Martin v. Atchison etc. R. R. Co.*, 166 U. S. 399; *McDonald v. Hazeltine*, 53 Cal. 35; *Kevern v. Providence etc. Co.*, 70 Cal. 392; *Trewatha v. Mining Co.*, 96 Cal. 394; *McLean v. Blue Point etc. Co.*, 51 Cal. 255.) The court erred in excluding the evi-

dence as to the customary practice of stevedores. (*Burns v. Sennett*, 99 Cal. 363; *Sappenfield v. Main etc. R. R. Co.*, 91 Cal. 48.) The plaintiff assumed all risks of the employment which were known to him as an experienced 'longshoreman, fully acquainted with the methods used by stevedores in the loading of vessels. (*Clark v. St. Paul etc. Ry. Co.*, 28 Minn. 128; *Money v. Lower Vein Coal Co.*, 55 Iowa, 671; *Yates v. McCullough Iron Co.*, 69 Md. 370; *Walsh v. St. Paul etc. Ry. Co.*, 27 Minn. 367; *Heath v. Whitebreast Coal etc. Co.*, 65 Iowa, 737; *Wilson v. Winona etc. Ry. Co.*, 37 Minn. 326; 5 Am. St. Rep. 851; *Alexander v. Tennessee etc. Min. Co.*, 3 N. Mex. 173; *Needham v. Louisville etc. Ry. Co.*, 85 Ky. 423.)

Reddy, Campbell & Metson, for Respondent.

A master is bound to use reasonable diligence to furnish his employees with a safe place for them to work, and to protect them against dangers incident to their employment. (Shearman and Redfield on Negligence, sec. 92, p. 119; *Higgins v. Williams*, 114 Cal. 176; *Mullin v. California Horseshoe Co.*, 105 Cal. 77; *Nixon v. Selby Smelting etc. Co.*, 102 Cal. 458; *Elledge v. National City Ry. Co.*, 100 Cal. 282; 38 Am. St. Rep. 290; *Anderson v. Ogden Union Ry. & Depot Co.*, 8 Utah, 128.) Where the negligence of the master contributes with that of a fellow-servant, the master is responsible. (*Fisk v. Central Pac. R. R. Co.*, 72 Cal. 38, 42; 1 Am. St. Rep. 22; *Grand Trunk Ry. Co. v. Cummings*, 106 U. S. 700, 702; Thompson on Negligence, 981, and cases cited.) This rule applies to the negligence of a fellow-servant to give warning, combined with the negligence of the master. (*Richmond etc. Ry. Co. v. George*, 88 Va. 223; *Cincinnati etc. Ry. Co. v. Clark*, 57 Fed Rep. 125.)

TEMPLE, J.—This is an action for damages for personal injuries alleged to have been suffered by plaintiff while in the employ of defendant. Defendant was a stevedore, and was engaged in loading dressed lumber upon the steamer "Aztec" at the Pacific Mail Steamship Company's dock. The lumber was delivered by the shippers in boxes, which consisted of four boards nailed together, and were about fifteen feet long and eight inches in each of the other dimensions. Sometimes the ends of the boxes were closed by wires, and sometimes they were not. Whether they were usually so closed, and whether it was negligence to load

them on the vessel in the mode adopted, without being so closed, are matters of interest in this case. As the jury found for the plaintiff, we are bound, if necessary to support the verdict, to assume that the jury believed those witnesses who testified that when loaded on the ship in boxes, as this lumber was, the ends of the boxes were nearly always closed, and if not so closed the lumber was very likely to slip out.

The lumber was taken from the wharf by the side of the vessel, where a chain was wrapped around two boxes containing lumber, and one end of the chain, having been put through a ring at the other end, was attached to a block and tackle and raised to the deck of the vessel and above the hatchway, through which it was then lowered to the hold of the vessel, where there were two gangs of workmen, who took alternate loads, stowing the lumber, one gang on one side of the ship and the other on the other side. It took about two minutes for each gang to stow its load, and they were lowered into the hold at the rate of one load each minute. The men took one box at a time, and, per consequence, they would be at the hatchway for the second box at about the time a load was coming down for the other gang. There were four compartments in the ship, and freight was being stowed in each compartment at the time of the accident. The work was being rushed as much as possible, as, according to the testimony, this kind of work always is. The men are paid by the hour, and understand that they must work as fast as possible or they will be ordered out. There was a great deal of noise about the ship while the work was in progress.

Defendant had stationed a man on the upper deck at the hatchway, whose duty it was to call out to the men at work in the hold, warning them of danger when the load was about to be lowered through the hatchway. He was called "the hatchman," and was accustomed to call out in a loud voice, "Stand clear below." There was plenty of room for the men to get away from danger, and it was shown that on this occasion, as a rule, the warning was given in time and was heard. There was evidence which tended to show that the warning was not given on the particular occasion when plaintiff was injured. Plaintiff testified that he did not hear it, and other witnesses testified that in the hurried work, with the great noise which prevailed, it might not be

heard or heeded if given. The men were, however, accustomed to rely upon the warning, more or less, for their security, as from various causes the load, or some part of it, might fall at any time while being lowered.

There was evidence which tended to prove that plaintiff was injured when in the act of picking up a box of lumber, not directly under the hatchway, but two feet inside the coamings. The contents of the box, consisting of fifteen or more boards, slipped out "like pouring water out of a glass," struck the shaft tunnel, and "bounced off" upon the plaintiff, injuring him very severely.

The theory of the plaintiff's case seems to be that the employer failed to furnish to plaintiff a safe place in which to do his work, and that the injury resulted from unusual and unnecessary hazard, which plaintiff did not assume by accepting the employment.

Counsel says: "Neither the failure of plaintiff to hear and heed the warning, if it was in fact given, nor the failure to give the warning, was the proximate cause of the injury, but this proximate cause was the negligence of the defendant in loading into the ship boxes of lumber that were liable to shoot their whole contents into the hold of the vessel so as to injure the workman, not only if they were standing directly underneath the hatchway, but even if they were several feet underneath the coamings, as was the plaintiff in this case at the time he was injured." Defendant, it is contended, was carrying on a hazardous employment in a reckless manner, and the warning, if given, was not an adequate protection against this unnecessary danger.

Defendant contended that such boxes of lumber were quite frequently shipped from this port, and that sometimes they were sent by the shipper with the ends of the boxes closed and sometimes open; that the stevedore took the lumber as it was delivered to him and loaded it in the condition in which he found it, and prevented injury to the men below by stopping the lumber at the coamings and giving a warning to the men below; that this was the usual and customary mode of doing the work, and had been found to be, and was in fact, a sufficient protection. Plaintiff was a stevedore, who admitted that he had often assisted in loading such

boxes, and knew all the hazards of the employment, and understood the purpose of the warning, and, as defendant did station at the hatchway a competent man to give the warning, defendant is not liable if plaintiff failed to heed the warning, or if his fellow-workmen neglected to give it.

So far as there is a conflict of evidence the presumption must, of course, be in favor of the respondent, except when we are considering the rulings in regard to the instructions.

One of the witnesses for the plaintiff testified that such lumber is usually delivered in boxes and is wired over the ends to keep the lumber from sliding out. If it is not wired, the lumber is sure to slide out. "It is usual and customary on the waterfront in San Francisco, in loading lumber of that character, to have obstructions across the ends of the boxes to keep the timber from falling out." The wires, he said, are put on in the lumber yard, but if it is delivered at the warf without wires it is shipped in that condition. He had known the shipper to be sent for and required to put on wires. He said, however, that it was no part of the stevedore's business to put on the wires, but to load the ship with the freight as delivered.

Plaintiff testified that they had been at work about one-half hour before he was hurt. Some lumber had fallen before that time. He came to assist in stowing the second case. He heard no warning, but looked, and seeing the hatchway clear, stopped to pick up the case, when the lumber being lowered slipped from the case, struck the shaft tunnel which ran across that hatch, bounded off, and hit him. He was not at the time under the open hatchway, but was about two feet inside the coamings. As to the warning, he said: "That is the usual and customary mode of giving to the men working in the hold full notice and warning to get out of the way of the load that is to be sent down the hatch."

The hatchman testified that the box from which the lumber fell had no wire upon it.

Defendant's witnesses gave nearly the same evidence, except that they emphasized the fact that such boxes were often stowed by stevedores without wires, and that the sling chains compress the lumber even in the boxes and usually prevent its slipping. They also testified that the precautions taken

in this case are such as are usual in such cases, and contended that such precautions had usually been found sufficient.

1. The first proposition of appellant is that the court erred in refusing to instruct the jury to find for the defendant. This contention, I think, cannot be sustained. The jury were warranted in finding from the evidence that loading timber of this character in the mode adopted was unusually and unnecessarily hazardous. Whether the plaintiff by accepting the employment assumed such risk was for the jury to determine. There was also evidence which could have justified a finding that in the hurry of the work and the noise the warning was insufficient to protect the workmen from the dangers which attended the work.

2. The defendant asked the court to give to the jury a long instruction to the effect that if they found that in loading lumber upon a ship, as this was being loaded, it was customary to station a man at the hatch to give such warning as has been described, and upon hearing the signal it was customary for the men to get to a place of safety, "and this means of warning the men had theretofore been found to be a safe and sufficient mode for the protection of the men so working in the hold," et cetera, and that all these precautions had been taken by defendant, then their verdict must be for the defendant. The court modified the instruction by striking out the words "had theretofore been found to be" and inserting the word "was."

I think the modification was proper—carelessness does not always result in injury. In a case of continued carelessness, when injury results, a common remark is that it is strange it did not happen before. Defendant will not be exonerated because others have been reckless and no one has been injured. As remarked in *Monaghan v. Pacific Rolling Mill Co.*, 81 Cal. 190: "That circumstance is only a matter of wonderment, and is an instance of how good luck will sometimes protect carelessness for long periods." The master's duty was to use due diligence to provide plaintiff a safe place in which to do his work. Former experience may have some bearing upon the question as to whether he has taken the proper precautions, but its value is for the jury.

I may remark, these hypothetical instructions are always dangerous, and especially so in a case of alleged negligence.

Negligence is the ultimate fact to be inferred from many probative facts. The inference is within the province of the jury, even when the facts are undisputed. When different conclusions as to negligence can reasonably be drawn from the admitted facts, it is not for the court to instruct the jury as to which is to be adopted by them.

The defendant also asked for an instruction which may be summarized thus: If it was not Bingham's duty to close the boxes so that the lumber would not slip out, but to load it into the ship as it was received, giving proper warning, as already explained, and a competent hatchman was employed to give the warning, and, if given, the workmen could have avoided the danger, "and the plaintiff accepted employment from the defendant Bingham with the understanding that his safety in the hold was to be secured by the giving of the warning referred to, and such further care on his part as should be necessary, then, and in that case," the verdict should be for the defendant.

The instruction is misleading. When the jury find that it was "only his duty to load the lumber into the ship as he received it, giving such warning," et cetera, they have found the entire issue as to negligence for the defendant. But this was probably not what was intended. Probably counsel meant, if the jury find that that was what he contracted to do. Respondent contends that he violated his duty when he loaded into the ship lumber in that condition, in that mode, and that the warning was not a sufficient protection, and that the risk, not being an ordinary risk of employment, was not assumed by the plaintiff. The jury were not required to find by this instruction that plaintiff knew that this particular lumber was to be loaded upon the ship in boxes, the ends of which had not been closed, and there was evidence to the effect that usually they were closed. Whether plaintiff assumed these unusual risks or not depended upon the question whether, under the circumstances, defendant understood and had a right to believe that plaintiff knew and assumed them. (*Martin v. California etc. Ry. Co.*, 94 Cal. 326.) Plaintiff may have been willing to depend upon the warning for his safety as against the ordinary risks of the work. Whether he was not in this case subjected to more than the ordinary risks of the employment was an important question

and was for the jury. Plaintiff himself testified that such lumber was sometimes loaded in open boxes. This was very important evidence on this issue for the defendant, but is still left a question for the jury, which this instruction would have taken from them.

I understand the warning was provided as additional security to the workmen from dangers resulting when the freight was being lowered into a hold, not dropped, and because, although the master used ordinary care to see that it was properly handled and safely lowered, still accidents might happen. But if the employer has failed to use ordinary care in the mode of doing the work, and, therefore, injury has resulted, he has failed to provide a safe place for the workmen to do their work, and has subjected them to unusual risks, which they did not assume by accepting the employment unless they knew of the unusual risks. (*Elledge v. National etc. Ry. Co.*, 100 Cal. 282; 38 Am. St. Rep. 290; Civ. Code, sec. 1971.) In such case the neglect of the employer in respect to duties which he cannot evade, by putting them upon a coemployee, has contributed to the injury, and he is responsible.

But this argument in favor of the rulings of the court below in regard to the instructions necessitates the reversal of the case upon another ground. The learned judge of the trial court evidently disagreed with the theory of the case which was acted upon by the defendant, and exception was taken to thirty-eight rulings made against the defendant in regard to the admission of evidence. Evidence was rejected which tended to show what was customary among stevedores in San Francisco in handling such lumber, and what the respective duties were of the workmen who were engaged in the work—that is, what was required of each, and especially of the hatchman and others engaged in lowering the freight.

I think this evidence was relevant and material. It tended to show what care was taken by the defendant in the work, and also what risks the plaintiff assumed by the employment. Plaintiff's own testimony shows that he was an experienced stevedore, and had long been employed as such at San Francisco. As to some of the evidence it might, perhaps, be shown that it was immaterial or that the particular

ruling was not harmful, but that certainly cannot be said as to all, and a more minute discussion could not be useful.

The judgment and order are reversed and a new trial ordered.

McFarland, J., and Henshaw, J., concurred.

[L. A. No. 481. Department Two.—September 5, 1899.]

R. H. McCRA Y, Respondent, v. JOHN BURR, Sheriff of
Los Angeles County, Appellant.

CONVERSION OF PERSONAL PROPERTY—FINDINGS—DAMAGES—NECESSARY IMPLICATION.—In an action for damages for the conversion of personal property, findings in favor of plaintiff's ownership and possession, and that the defendant sheriff took the property and sold the same as alleged in the complaint, that it was of the value of seven hundred dollars, and that by virtue of the levy and sale said property was entirely lost to the plaintiff, followed by a conclusion of law that plaintiff is entitled to recover of the defendant the said sum of seven hundred dollars with interest, though informally drawn, necessarily imply that plaintiff was thereby damaged in the amount of the value of the property, and are sufficient to support the judgment without an express finding to that effect.

ID.—FINDING OF PROBATIVE FACTS.—Where probative facts are found from which the court can declare that the ultimate facts necessarily result, the finding is sufficient.

ID.—DEMAND UPON SHERIFF—OWNERSHIP OF PROPERTY—CAUSE OF ACTION.—The demand upon the sheriff is no part of the cause of action for conversion of the property, but is a mere statutory requirement for the benefit of the sheriff; and it is not necessary that the findings should specifically show that plaintiff was a owner of and entitled to the property at the time of such demand.

APPEAL from a judgment of the Superior Court of Los Angeles County. Lucien Shaw, Judge.

The facts are stated in the opinion of the court.

Jones & Weller, and McKinley & Graff, for Appellant.

Curtis D. Wilbur, and Murphey & Gottschalk, for Respondent.

McFARLAND, J.—This is an action to recover damages for the alleged conversion of certain personal property. The case was tried without a jury, and judgment was rendered for plaintiff. Defendant appeals from the judgment upon the judgment-roll alone.

It was averred in the complaint that on the 4th of April the plaintiff was the owner of, in possession of and entitled to the possession, and ever since has been the owner and entitled to the possession of, certain described personal property consisting of horses, wagons, and farming implements; that on the said fourth day of April the defendant, as sheriff, levied upon and took possession of said property under a writ of attachment in a suit against one S. R. McCray, brought by third parties, and converted the same to his own use; that before the commencement of this action, to wit, on or about the fourteenth day of April, the plaintiff demanded of the defendant the possession of the said property in accordance with the statutory provisions upon the subject, and that the defendant refused to deliver the same to the plaintiff; that the value of the property was about nine hundred and seventy dollars, and that the plaintiff had expended large sums of money in pursuit of the same; and that by reason of the wrongful taking, detention, and conversion of the property plaintiff was damaged in the sum of fifteen hundred dollars, for which he prays judgment.

The main contention of appellant is, that the findings do not support the judgment because there is no finding that plaintiff was damaged in any amount whatever. No doubt the findings could have been more full and specific, but we think that they are sufficient to support the judgment. A great many embarrassing questions have been raised in this court in consequence of a want of care in preparing findings. It seems to have been assumed in many cases that when the trial court had announced the judgment which it intended to enter the case was over, and there was nothing farther for the winning side to look to; but it must be remembered that under our code findings must be prepared which must contain statements of facts necessary to support the judgment. In the case at bar, while there has been carelessness in the preparation of the findings, still we think that they are sufficient. The court finds that on the said fourth day of April

the plaintiff was the owner of and in possession of the property, and that it was of the value of seven hundred dollars; and that on said day the defendant took the property as alleged in the complaint and afterward sold the same, and that by virtue of the levy and sale "said property was entirely lost to the plaintiff." And as a conclusion of law the court finds that the plaintiff is entitled to recover of the defendant the said sum of seven hundred dollars, with interest, et cetera. The objection to the finding is, that the court does not expressly say that the plaintiff was thereby damaged in the sum of seven hundred dollars, or any sum; but from the facts found it necessarily follows that the damage accrued to plaintiff. "Where probative facts are found, and the court can declare that the ultimate facts necessarily result from the facts which are found, the finding is sufficient." (*Alhambra etc. Water Co. v. Richardson*, 72 Cal. 601. See, also, *Souter v. Maguire*, 78 Cal. 543; *Coveny v. Hale*, 49 Cal. 552; *People v. Hagar*, 52 Cal. 189; *Osborne v. Clark*, 60 Cal. 622.) From the facts found in the case at bar it necessarily followed that plaintiff was damaged in the amount of the value of the property. Moreover, the court finds that by virtue of the other facts found the property "was entirely lost to plaintiff;" and while this language is not very good legal literature, yet it sufficiently includes the fact of damage.

The findings are not deficient because the court did not find that on the fourteenth day of April, when plaintiff made his demand upon the sheriff, the plaintiff was then the owner of and entitled to the property. The cause of action was the taking of the property on the fourth of April; demanding its return was a mere statutory requirement for the benefit of the sheriff. We see no other points necessary to be noticed. The claim of respondent that damages should be imposed for a frivolous appeal cannot be allowed; the respondent under the circumstances, should be satisfied with an affirmance of the judgment.

The judgment appealed from is affirmed.

Temple, J., and Henshaw, J., concurred.

[L. A. No. 484. Department Two.—September 5, 1899.]

L. C. McKEEBY, Appellant, v. CITY OF LOS ANGELES,
Defendant.

OPENING OF STREET—AWARD OF DAMAGES TO ESTATE OF DECEDENT—VOID DEED OF ADMINISTRATOR.—Upon the opening of a street by a city, and the award of damages therefor to the estate of a deceased person, a deed to the city by the administrator of the land of the estate taken by the city for the street, executed without an order of court authorizing it, is void.

ID.—USE OF DAMAGES FOR BENEFIT OF ESTATE—CONSENT OF HEIR—ACTION BY GRANTEE.—Where the damages awarded to the estate were paid to the administrator and used for the benefit of the estate, which was settled with the full consent of the sole heir, after knowledge of all the facts, his grantee, with like knowledge, cannot maintain an action to recover the damages a second time from the city.

ID.—ACTION FOR DAMAGES—TITLE NOT INVOLVED.—In an action by the grantee of an heir to recover damages for the taking of land of the estate by the city, under a void deed of the administrator, the title to the land, or the right of the city to retain possession of it as against the heir, is not involved.

ID.—POSSESSION AND PAYMENT BY CITY UNDER MISTAKE OF LAW—TRESPASS—DUTY OF ADMINISTRATOR TO COLLECT DAMAGES.—The taking of possession of the street by the city and the payment of the damages, under a mistake of law as to the unauthorized deed of the administrator, has no other effect upon the claim for damages than if the city had taken possession by trespass, without the knowledge or consent of the administrator; and the claim for damages being an asset of the estate, it was the duty of the administrator to collect the damages for its benefit.

ID.—STATUTES AS TO SALES OF LAND INAPPLICABLE.—The statutes relating to sales of land by an administrator, compliance with which is essential to a valid sale, have no application to claims for damages accruing to the estate by reason of acts of trespass upon the land.

ID.—EFFECT OF DISTRIBUTION TO HEIR.—The heir having consented to the settlement of the estate with the claim for damages included therein by the administrator to his knowledge for the benefit of the estate, took the estate on distribution freed from any claim against the city on account of the damage to the land taken for the street; and his grantee stands in his shoes in relation thereto.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial. Walter Van Dyke, Judge.

The facts are stated in the opinion.

McKeeby & Whitney, and H. H. Appel, for Appellant.

The deed of the administrator, not having been made pursuant to law, was a void act. (*Gregory v. McPherson*, 13 Cal. 562, 576, 577; *Townsend v. Gordon*, 19 Cal. 189, 208; *Pryor v. Downey*, 50 Cal. 388; 19 Am. Rep. 656; *Hill v. Den*, 54 Cal. 6; 85 Cal. 390; 20 Am. St. Rep. 232; *Nowler v. Coit*, 1 Ohio, 519; 13 Am. Dec. 640; *Bloom v. Burdick*, 1 Hill, 130; 37 Am. Dec. 299, 307.) The title to the land was vested in the heirs, subject to administration (Civ. Code, sec. 1384), and the city could not acquire the title by dealing with the administrator alone. (Finlayson's *Street Laws*, 262.) The payment under a mistake of law to the administrator was voluntary. (*Hurd v. Hall*, 12 Wis. 124; *Brumagim v. Tillinghast*, 18 Cal. 271; 79 Am. Dec. 176), and could neither be recovered back nor offset against the claim of the heir or his grantee. (*Cornell v. Smith*, 6 N. W. Rep. 430-461.) There is no ground for an estoppel *in pais* against the heir. (*Hill v. Den*, 54 Cal. 6, 23; 85 Cal. 390, 400; 20 Am. St. Rep. 232; *Dorlarque v. Cress*, 71 Ill. 380.) A void estate cannot be satisfied. (Freeman on Void Judicial Sales, sec. 48.) The action is warranted by the decisions of this court. (*Reardon v. San Francisco*, 68 Cal. 492; 56 Am. Rep. 109; *Bieglow v. Los Angeles*, 85 Cal. 614; *Tyler v. Tehama Co.*, 109 Cal. 619.)

W. E. Dunn, for Respondent.

Plaintiff stands in the shoes of his grantor, and is bound by the same estoppel. (*Ions v. Harbison*, 112 Cal. 261.) The heir consented to the settlement of the claim for damages as part of the estate, and is not wronged by it. (Civ. Code, sec. 3515.) The heir and the plaintiff are bound by an estoppel *in pais*. (*Carpy v. Dowdell*, 115 Cal. 680; *Scott v. Jackson*, 89 Cal. 258.) The land was taken by the city, and the award of damages was properly collected by the administrator.

CHIPMAN, C.—Action for damages. The court found the following facts: Under the provisions of the act of March 6, 1889 (Stats. 1889, p. 70), for laying out, opening, and extending any street et cetera, and to condemn and acquire any land necessary or convenient for that purpose,

the city council of the city of Los Angeles took all the steps required by the statute to assess the benefits and damages for the opening of Castelar street into Bellevue avenue; the report of the commissioners was confirmed and adopted May 7, 1894, and among other pieces of property described in the ordinance of intention and in the report as land to be taken for said opening of said street was a portion of lot 24 in block H of the Fort Hill tract, reported as belonging, and which did belong to the estate of Mary Martin, deceased, and the sum of six hundred and twenty dollars was fixed and allowed as the value of said portion of said lot; D. W. Field, public administrator, was the administrator of said estate at the time and so continued until after March 12, 1893; on February 15, 1895, the street commissioners, by warrant drawn on the funds of the treasury of said city to the account of said improvement, paid to said Field the sum of six hundred and twenty dollars, as administrator of said estate, and on that day he executed, as such administrator, to the city a deed conveying said portion of said lot and delivered the same to the commissioners; one Samuel Earl was the sole heir of deceased, and as such succeeded to all the property of the estate subject to all just debts of deceased and costs and expenses of administration; said sum so paid to said Field was used by him and applied "in payment of claims against said estate of Mary Martin, deceased, and costs of administration, duly allowed, and that in his final account as such administrator said Field fully accounted for the same as money received 'for improving streets,' and that on the settlement of said final account it appeared that said estate was indebted in the sum of seven hundred and ten dollars, and that the further sum of ninety dollars, in addition to said sum of six hundred and twenty dollars, was required to pay off and discharge the debts and expenses of administration in order to close up said estate; that said sum of ninety dollars was advanced by said heir, Samuel Earl, and said account settled and allowed; that said Earl was represented on the hearing of settlement of said final account by his attorneys (one of whom is the plaintiff in this action), and that no exceptions or objections to said final account were made"; a decree of distribution was thereafter entered whereby the whole of said lot was

distributed to said Earl, who thereafter made his deed of conveyance to plaintiff, who "knew that said commissioners had paid said sum of six hundred and twenty dollars to said Field, and that said Field had executed and delivered said deed to said city, and that said Field had paid and applied said sum of six hundred and twenty dollars in satisfaction of legal and duly allowed claims against the estate of said Mary Martin, deceased"; "the value of the strip of land hereinbefore described and the damages to the remaining portion of said lot. . . . does not exceed in the aggregate the sum of six hundred and twenty dollars." As conclusions of law the court found that the plaintiff should recover nothing by his action, and that defendant should recover its costs. Judgment was accordingly entered, from which and from an order denying motion for a new trial plaintiff appeals.

It is admitted that the administrator took no proceedings in the probate court to sell the property to the city, and obtained no order to convey it. All parties agree that his deed was without authority and is void. The evidence shows that Earl, the sole heir of deceased, plaintiff's grantor, had knowledge of the conveyance by the administrator and the purpose for which it was given; he had knowledge that the consideration paid was used by the administrator in paying debts and expenses of administration, and his attorney, the present plaintiff, was in court at the time the final account was heard as Earl's representative, and he examined the items of the account. Plaintiff testified: "We looked at the account and had no objection to it. We wanted to see what part of the six hundred and twenty dollars was paid." When asked to what extent he represented Earl he said: "to the extent I have stated. We simply said that we had no objection to that account. The court asked if we had looked at this account, and we said yes, and that we had no objection." And, again, he said he "consented that this account be allowed." The account shows receipts, including an item of six hundred and twenty dollars "cash received Los Angeles city damages to Reid lot for improving street," two thousand and twenty-two dollars and eighty cents, and disbursements two thousand and four dollars. There was a report accompanying the account explaining this item of six hundred and twenty dollars, and showing a balance of eighteen dollars and eighty cents. The account was settled

as rendered, and Earl's attorneys advanced for Earl to the administrator sufficient (ninety dollars as shown by the report) to enable the estate to be closed and the property distributed. Subsequently, with full knowledge of all the facts, plaintiff took his deed from Earl (including an assignment of any claim he had for damages), presented the claim to the city authorities for damages, which being refused he thereupon brought this suit.

So far as we can see, it is a simple action for damages done by the city under a deed which it is conceded has no validity. The right of the city to retain the possession of the land is not involved.

The city was a trespasser, and as such became liable in damages. It paid in full, however, all the court found that the land was injured, and the only question is whether it should pay a second time.

Appellant's position is, that the payment by the city was under a mistake of law, and was a voluntary payment to the administrator and cannot be recovered from him nor from one to whose benefit he applied it, by way of counterclaim or set off; that there is no ground for estoppel in the case against the heir or his grantee, and there is no right of subrogation; that the decree of distribution, until set aside, is a complete estoppel of record against the city.

Whatever may be the law in this state as to the title to the land and the right of the city to withhold possession from plaintiff—questions not now involved—we think the plainest principles of equity and good conscience should prevent plaintiff from recovering damages after having once had the benefit of full payment. When the land was damaged it was part of the estate; the city became at once liable to the estate, but we cannot see that because the liability arose through mistake of law and through the unauthorized act of the administrator, the claim for damage would be different from a claim which would have arisen if the city had proceeded without the knowledge or consent of the administrator; the claim became an asset of the estate, and it was the duty of the administrator to collect it, and he did so, as the representative of the heir, and accounted for the money to the estate, and used it to pay debts and charges for which

the land in question was liable, and which had to be paid before complete title could pass by distribution to plaintiff's grantor. Conceding that, if this were an action to quiet title or to recover possession of the land, defendant would not be subrogated to the rights of creditors, and would not be entitled to the repayment of the money it paid out before plaintiff could recover, and also conceding that in such an action plaintiff would not be estopped because he had indirectly received the benefit of the sale, it seems to us that the principles upon which the court might hold with plaintiff do not apply. The statutes relating to sales of land by an administrator, compliance with which is essential to a valid sale, have no reference to claims accruing to the estate by reason of acts of trespass upon the land. There is no pretense of fraud in the permission given by the administrator to the defendant to take possession of the land. The most that can be said is, that he unlawfully permitted injury to property in his care and custody as trustee of the estate and of the heir at law. But when that injury was fully compensated, and the estate and the heir received the full benefit of the compensation, and the heir consented to the settlement of the final account, including this item of damage to his property, he took the land on distribution freed from any claim against defendant on account of this damage. The administrator, as the representative of the heir, had a right as such to accept payment for the damage, subject to the approval of the court; he had this approval when his account was settled and allowed, and, as the heir consented to the allowance of the account, we cannot see why his grantee, who stands in his shoes, should be heard to complain.

We advise that the judgment and order be affirmed.

Haynes, C., and Gray, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are affirmed.

McFarland, J., Temple, J., Henshaw, J.

[S .F. No. 787. Department One.—September 6, 1899.]

ADAM BROWN, Respondent, v. CHARLOTTE D. ROUSE,
Appellant.

HUSBAND AND WIFE—AGENCY—UNAUTHORIZED LOAN—RATIFICATION—FINDINGS AGAINST EVIDENCE—DECISION UPON FORMER APPEAL.—The findings in this case as to the ratification by a wife of the unauthorized act of her husband in borrowing money, which was obtained upon a note and mortgage executed by him without authority as her attorney-in-fact, held not sustained by evidence not differing in legal effect from that appearing upon a former appeal (104 Cal. 672), which was held insufficient to establish a ratification of the loan, for want of knowledge by the wife of her rights, and for want of reception by her of the benefit of the loan, except as to part thereof paid to release a mortgage upon her property.

ID.—RELEASE OF PRIOR MORTGAGE OF WIFE'S PROPERTY—UNAUTHORIZED SECOND MORTGAGE—VOLUNTARY PAYMENT—MISTAKE OF LAW—SUBROGATION.—A stranger to a prior mortgage of the wife's property who voluntarily advanced money upon an unauthorized second mortgage thereupon executed by the husband assuming to act under a power of attorney from the wife, which did not authorize the loan or the mortgage, and who voluntarily caused part of the money advanced to be paid to release and discharge the prior mortgage, for his own supposed security, acting under a mistake of law, with knowledge of all the facts, cannot, upon the declaring of the second mortgage invalid, be subrogated to the rights of the prior mortgagee as to the money so voluntarily paid.

ID.—SUBROGATION NOT ALLOWED IN FAVOR OF VOLUNTEER.—Subrogation will not be decreed in favor of a mere volunteer who, without any duty, pays the debt of another. It will not arise in favor of a stranger; but only in favor of a party who on some sort of compulsion discharges a demand against a common debtor.

APPEAL from a judgment of the Superior Court of Santa Clara County and from an order denying a new trial. John Reynolds, Judge.

The facts are stated in the opinion rendered upon this appeal, and in those rendered by the court upon former appeals, 93 Cal. 237, and 104 Cal. 672.

John H. Durst, for Appellant.

The evidence being substantially the same, the ruling on the former appeal is the law of the case. (*Gould v. Adams*, 108 Cal. 365; *Mills v. Home Ben. etc. Assn.*, 105 Cal. 232; *Brusie v. Gates*, 96 Cal. 265; *Castagnino v. Balletta*, 82 Cal. 250, 260; *Sharon v. Sharon*, 79 Cal. 633, 687; *Reclamation Dist. No. 3 v. Goldman*, 65 Cal. 636; *Jaffe v. Skae*, 48 Cal. 540; *Benson v. Shotwell*, 103 Cal. 163, 165; *People v. Holladay*, 93 Cal. 241; 27 Am. St. Rep. 186.) The cause of action for money loaned was barred when the amended complaint was filed. (*Morton v. Bartning*, 68 Cal. 306; *Anderson v. Mayers*, 50 Cal. 525; *Meeks v. Southern Pac. Ry. Co.*, 61 Cal. 149; *Atkinson v. Amador etc. Canal Co.*, 53 Cal. 102.) The plaintiff is not entitled to subrogation. (*Guy v. Du Uprey*, 16 Cal. 196; 76 Am. Dec. 518; *Campbell v. Foster Home Assn.*, 163 Pa. St. 609; 43 Am. St. Rep. 818.)

W. C. Kennedy, for Respondent.

The statute of limitations does not apply, as no new cause of action was set up. (*Easton v. O'Reilly*, 63 Cal. 308; *Cox v. McLaughlin*, 76 Cal. 60; 9 Am. St. Rep. 164; *Castagnino v. Balletta*, 82 Cal. 250; *White v. Soto*, 82 Cal. 657; *Redington v. Cornwell*, 90 Cal. 62.) At most the evidence is conflicting, and the court will not disturb the decision of the court below. (Hayne on New Trial and Appeal, sec. 288; *Lick v. Madden*, 36 Cal. 213; 95 Am. Dec. 195; *McKeever v. Market Street R. R. Co.*, 59 Cal. 300; *McDermott v. San Francisco etc. R. R. Co.*, 68 Cal. 34.) The decision of the court upon a question of fact does not become the law of the case. (*Mattingley v. Pennie*, 105 Cal. 515; 45 Am. St. Rep. 87; *Wallace v. Sisson*, 114 Cal. 44.) The finding that the loan was ratified is sufficient to sustain the judgment. (*Brown v. Rouse*, 93 Cal. 240.) Under the evidence and findings in this case, plaintiff is entitled to be subrogated to the mortgagee, Davis. (*Dillon v. Byrne*, 5 Cal. 455; *Birrel v. Schie*, 9 Cal. 104; *Carr v. Caldwell*, 10 Cal. 380; 70 Am. Dec. 740; *Swift v. Kraemer*, 13 Cal. 530; 73 Am. Dec. 603; *Tolman v. Smith*, 85 Cal. 290; *Lockwood v. Marsh*, 3 Nev. 138.) And for attorney's fees as well. (*Levy v. Martin*, 48 Wis. 199.) The defendant ratified and confirmed the note as fully as if she had made it. (1 Am. & Eng. Ency. of Law, 420; Wharton on Agency, secs. 68, 75, 89, 92, 174, 478.)

The reception of the money by defendant as hers, in her husband's hands, and her payment of the interest on the note, with full knowledge of the facts, made the note her note and debt. (*Raccouillat v. Sanscivain*, 32 Cal. 376; *Frink v. Roe*, 70 Cal. 311.) Retaining the proceeds of an unauthorized loan, after knowledge of the facts, ratifies the loan. (*Wallace v. Lawyer*, 90 Ind. 499; *McDowell v. McKenzie*, 65 Ga. 630; *Smith v. Tracy*, 36 N. Y. 79; authorities cited in 1 Am. & Eng. Ency. of Law, 437, note 1.) Having so ratified, principal can no longer deny agent's authority. (*Beall v. January*, 62 Mo. 434; *Perkins v. Boothby*, 71 Me. 91; *Clark v. Van Riemsdyk*, 9 Cranch (U. S.), 153; *Parish v. Reeve*, 63 Wis. 315; *Silverman v. Bush*, 16 Ill. App. 437.) When the unauthorized act is done in the execution of a power and in excess or misuse of the authority given, ratification is more readily implied from slight acts of confirmation. (*Harrod v. McDaniels*, 126 Mass. 415; *Myres v. Mutual Ins. Co.*, 32 Hun, 321; *State v. McCauley*, 15 Cal. 450; *Jones v. Marks*, 47 Cal. 247; *Ayers v. Palmer*, 57 Cal. 309.) When A signs a note as agent of B—though without authority—and B, knowing the fact, promises to pay the note, though without new consideration, this ratifies the act. (Wharton on Agency, sec. 88; *Long v. Colburn*, 11 Mass. 97; 6 Am. Dec. 160; *Commercial Bank v. Warren*, 15 N. Y. 577; *Ward v. Williams*, 26 Ill. 447; 79 Am. Dec. 385; 1 Am. & Eng. Ency. of Law, 438, note.)

CHIPMAN, C.—This is the third appeal of the case. Originally, the action was to foreclose a mortgage executed by one German M. Rouse, under power of attorney, in the name of defendant, who was then his wife. At the first trial the court below held the note and mortgage to have been given without authority, but entered a personal judgment against defendant for \$1,271 and costs. On appeal, this judgment was reversed as outside the issues. (*Brown v Rouse*, 93 Cal. 237.) At the second trial plaintiff amended his complaint, alleging a loan of \$1,200 on November 18, 1887, and its non-payment. Plaintiff had a personal judgment for \$1,510.68 and costs, on the theory that defendant had ratified the loan. On the second appeal the judgment was reversed, on the ground that the evidence failed to establish ratification. (*Brown v. Rouse*, 104 Cal. 672.) Defendant had previously

given a mortgage on the land to one Davis, which had been overdue for three years and a half at the time of this alleged loan. In the opinion reversing the second judgment the court said: "As to the \$481.65 which went to satisfy the Davis mortgage, it would certainly be proper and just for appellant to pay it; and it is stated in appellant's brief that she is willing to pay it. . . . Perhaps, under appropriate pleadings and findings, plaintiff could recover for the amount of money that went to satisfy the said prior mortgage." The third trial was upon an amendment of the complaint, by which it was alleged that defendant, through her husband, procured plaintiff, as agent, to pay, and he did pay and satisfy, the Davis mortgage, amounting to \$580, in full discharge thereof, and that Davis released the same at defendant's request acting through her said agent; that she had full knowledge of these facts, and thereupon ratified and confirmed said release and discharge of said mortgage, and all the acts of her said agent, Rouse, and said sum of \$580 forms a part of the consideration alleged to have been created by the said loan of \$1,200 on November 18, 1887. The court found the facts substantially as alleged in the complaint, and that the amount paid to Davis was \$481.65. The court also found that defendant had knowledge of all said facts, "and thereupon expressly ratified and confirmed said payment and release of said mortgage, and all of said acts of said agent, G. M. Rouse."

As to the loan of \$1,200, the court found that defendant's husband, assuming to act as agent and attorney in fact, and in pursuance of said power of attorney, borrowed from plaintiff and said plaintiff loaned to defendant the sum of \$1,198, and gave therefor to said plaintiff a promissory note executed by said German M. Rouse, in the name of said Charlotte D. Rouse, for \$1,200, which remains unpaid except the said sum of \$481.65, and that defendant "did receive by her said husband, and as her agent, the residue of said \$1,198. . . . Subsequently to said eighteenth day of November, 1887, and from time to time, she ratified and confirmed the loan made by Brown by letters instructing the payment of interest on said loan after being fully informed and having specific and complete knowledge of said loan and all the circumstances

thereof." These interest payments were \$54 on May 19, 1888; and \$54 in November 23, 1888, being semi-annual installments at nine per cent. It is further found that when the money was borrowed defendant and her husband resided in the territory of Washington; that soon after the loan her husband returned to their then home, "taking with him the balance of said money, to wit, \$716.35; that he then reported to his said wife that he had borrowed the money in her name, and had used the sum of \$481.65 to pay off said mortgage, and that he had the balance with him. And that she, knowing that he had said money, did not request him to pay it to her, but allowed him to use the same as he saw fit, believing at the time that she was liable therefor. That thereafter she ratified and confirmed the acts of her said husband in procuring said sum of \$1,198 from the plaintiff." Judgment was accordingly entered in favor of plaintiff for \$1,729.37 and costs. Defendant claims that the evidence does not support these findings nor the decision, and that the decision is against law, and appeals from the judgment and from the order denying her motion for a new trial.

So far as the alleged ratification of the loan is concerned, the case is in no particular strengthened by any new evidence. Plaintiff added to his testimony given at the second trial the following as to the loan to Mrs. Rouse: "She got the full benefit of it." He had no personal knowledge of the fact; he never saw her, and at the time defendant's husband borrowed the money she was in Washington Territory and he was in California. His statement has no probative value. Added to the former evidence are certain letters—one from Mrs. Rouse to Rucker & Son, her then agents in San Jose, dated July 21, 1887, relating to the management of the property, and stating her desire to sell at a price not less than \$2,000, and refers to the mortgage then on the place; a letter also dated October 27, 1887, from Rucker & Son to J. H. Durst of San Francisco, defendant's nephew, calling attention to an offer they had for the property, to which Durst replies October 28th, stating that he has not heard from Mrs. Rouse lately, and must refer the matter to her. These were all written before the alleged loan and seem to have no relation to it, and certainly cast no light upon the alleged ratification of the loan subsequently made. The evidence as to

ratification stands precisely where it did when the case was last here, and we discover no reason for changing the opinion then expressed upon the point.

Upon substantially the same evidence as now here the trial court at the second trial found, as conclusion of law, that plaintiff was not entitled to be subrogated to the Davis mortgage, but was entitled to recover the amount of the loan on the ground of ratification. The court at the last trial made no finding as to the right of plaintiff to be subrogated to the Davis mortgage, but found that plaintiff was entitled to recover the amount of the loan with interest at seven per cent from November 18, 1887.

Plaintiff, however, urges his right to be subrogated to the Davis mortgage, and he prays that this may be done; but he does not ask that he be treated as the equitable assignee of the Davis mortgage, and that it be foreclosed for his benefit, the property sold and its proceeds applied to the payment of his claim to the amount of the Davis mortgage. Subrogation is the substitution of another person in the place of a creditor, the substituted party succeeding to the rights of the creditor in relation to the debt. The substitute is put in all respects in the place of the party to whose right he is subrogated. (Sheldon on Subrogation, sec. 1.) The Davis note was dated January 1, 1884, and was due twelve months after its date. The statute of limitations barred foreclosure after January 1, 1889. There is evidence tending to show that this action was not brought until after January 1, 1889, and after the Davis note and mortgage were barred by the statute; and defendant has pleaded the statute. It is not necessary to pass upon the question of limitation.

The right of subrogation in this case rests upon the undisputed facts that plaintiff's mortgage was made without defendant's authority, and we have held that it was not afterward ratified; it therefore is a nullity as to defendant; when plaintiff made the loan to Rouse, the two went together with Davis to the recorder's office; out of the money loaned the Davis mortgage was paid, and it was thereupon satisfied of record, and the plaintiff's mortgage was then recorded; plaintiff had previously caused the record to be searched; he testified: "Being told by Mr Bailey that the title was all right, and that the power of attorney was all right and of record,

and appeared in the abstract, I made the loan in good faith upon the property and under the circumstances I have stated." He did not take an assignment of the Davis mortgage, but paid the debt secured by it and had it canceled. There was no mistake of fact, for he had knowledge of the authority under which Rouse was acting; his mistake was one of law. No question of fraud, accident, or mistake of fact arises. The case is closely analogous to *Guy v. Du Uprey*, 16 Cal. 196, 76 Am. Dec. 518, where the mortgage was executed by the guardian of a minor without authority, and the guardian used a portion of the money to discharge a valid mortgage lien resting on the property at the time. It was held that the guardian could not be substituted in the place of the prior mortgagee for the reason that he made payment voluntarily and as a stranger.

We think *Guy v. Du Uprey*, *supra*, correctly states the law of this case, and is in harmony with adjudications of the question in other states. (See cases collected in 24 Am. & Eng. Ency. of Law, 281, tit. Subrogation; Sheldon on Subrogation, sec. 240.)

The case of *Campbell v. Foster Home Assn.*, 163 Pa. St. 609, 43 Am. St. Rep. 818, in most respects, was a counterpart of the case here. The mortgage under which subrogation was claimed was executed under a power of attorney to sell, and the money borrowed by this mortgage was, in part, used to pay off and discharge then existing prior mortgage liens. Both questions as to the power to mortgage under a power to sell and the right of subrogation had very full consideration, and an unusually painstaking examination of the authorities is shown in the opinion. It was held that the mortgagee, on the second mortgage being declared invalid, had no right to be subrogated to the position of the first mortgagee so as to recover the six thousand dollars paid in extinguishment of the first mortgage. It was said in *Webster's Appeal*, 86 Pa. St. 409: "While subrogation is founded upon principles of equity and benevolence, and may be decreed where no contract exists, yet it will not be decreed in favor of a mere volunteer who, without any duty, moral or otherwise, pays the debt of another. It will not arise in favor of a stranger, but only in favor of a party who, on some sort of compulsion, discharges a demand against a common debtor."

At the second trial defendant expressed a willingness to pay the amount of the Davis mortgage, and at the last trial counsel for defendant offered in open court to allow judgment to go against defendant for the sum of \$481.65. These overtures, however, were rejected, the plaintiff apparently insisting upon the full amount or nothing.

We advise that the judgment and order be reversed.

Gray, C., and Haynes, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are reversed.

Harrison, J., Garoutte, J., Van Dyke, J.

Hearing in Bank denied.

[S. F. No. 974. Department Two.—September 6, 1899.]

DWIGHT SHERWOOD and JULIA C. SHERWOOD, Appellants, v. SHELTON KYLE, Respondent.

NEW TRIAL—EXCESSIVE DAMAGES FOR SLANDER—CONDITIONAL ORDER—

POWER OF COURT.—Upon a motion for new trial upon the ground that excessive damages were awarded by the jury to the plaintiff in an action for slander, under the influence of passion or prejudice, the court has power to make a conditional order granting a new trial, unless the plaintiff shall remit the portion of the judgment for damages deemed by the court to be excessive.

ID.—DAMAGES FOR PERSONAL TORT—DUTY OF COURT—DISCRETION—

REVIEW UPON APPEAL.—In an action for damages for a personal tort, the court should not substitute its judgment for that of the jury, and should not grant a new trial for excessive damages, unless it is so excessive as to indicate that it was given under the influence of passion or prejudice. But the action of the court in granting a new trial upon that ground will not be disturbed upon appeal where it does not clearly appear that its discretion to grant it has been abused.

ID.—ORDER GRANTING NEW TRIAL—REVIEW OF GROUNDS OF MOTION.—

An order granting a new trial upon any ground may be sustained by the respondent upon any point involved in the motion.

APPEAL from an order of the Superior Court of Lake County granting a new trial. R. W. Crump, Judge.

The facts are stated in the opinion of the court.

R. J. Hudson, and Dan Jones, for Appellants.

The court had no right to substitute its opinion for that of the jury in an action of this kind. (*Aldrich v. Palmer*, 24 Cal. 514; *Boyce v. California Stage Co.*, 25 Cal. 472; *Wilson v. Fitch*, 41 Cal. 363; *Harris v. Zanone*, 93 Cal. 59.)

T. J. Sheridan, and J. J. Bruton, for Respondent.

The court had discretion to grant the new trial, conditionally and absolutely. (*Davis v. Southern Pac. Co.*, 98 Cal. 17; *Brooks v. San Francisco etc. R. R. Co.*, 110 Cal. 176; *Quinn v. Kenyon*, 22 Cal. 83; *Savage v. Sweeney*, 63 Cal. 340.) And the rule is the same when the trial court reduces the verdict in causes of action sounding in tort. (*Gregg v. San Francisco etc. R. R. Co.*, 59 Cal. 312; *Davis v. Southern Pac. R. R. Co.*, *supra*; *Lee v. Southern Pac. Co.*, 101 Cal. 118; *Domico v. Casassa*, 101 Cal. 411.) It was one of the grounds of the motion that the plaintiff was not damaged in any sum, and the appellate court may consider that question in sustaining the order granting the new trial. (*Du Brutz v. Jesup*, 54 Cal. 118; *Bennett v. Hobro*, 72 Cal. 178.) Whatever ground may be assigned by a trial court for making such an order, it will be upheld by this court if it can be justified upon any other ground. (*Nally v. McDonald*, 77 Cal. 284; *Harnett v. Central Pac. R. R. Co.*, 78 Cal. 31; *Kaufman v. Maier*, 94 Cal. 269.)

TEMPLE, J.—This is an action for slander, wherein the plaintiffs seek damages for injurious words spoken of the plaintiff, Julia C., in respect to her profession or occupation as a school teacher.

After suitable allegations in regard to the qualification and occupation of said Julia C., plaintiffs charge that while engaged in her profession, and while school was in session, defendant entered her schoolroom, and, in the hearing of the pupils, spoke willfully and maliciously to, of and concerning said plaintiff the following false and scandalous words: "You have no business to be in charge of young children. You are no more fit to teach school than hell is for a powder-house," meaning, et cetera.

Defendant does not deny the language attributed to him, but says it was not malicious and has not damaged plaintiffs. He avers, also, that the language was privileged; he was a trustee of the school district, and, having evidence that the proper discipline was not maintained by such plaintiff, he went to the school to remonstrate, and did not intimate or say anything derogatory to Mrs. Sherwood, except that she did not maintain the proper control over her pupils, and for that reason only was unfit to teach. He denies that he harbors any malice or ill-will toward said plaintiff, or that he was at all angry with her. And he avers that his charge, that she was unfit to teach school because of her lack of power to control her pupils, is true.

In another defense he alleges that he owns and occupies a farm adjoining the school lot, and the school children, through lack of proper control, have frequently committed depredations upon his property, and therefore he went to the teacher to complain and to request that she exercise some restraint over her pupils.

Plaintiffs recovered a verdict for one thousand dollars, which the trial judge, upon the motion for a new trial, adjudged to be excessive. The court then made an order granting a new trial unless plaintiffs would remit seven hundred dollars. This plaintiffs declined to remit and the order was made absolute.

The first question which naturally presents itself for consideration is whether this court can set aside the order on the ground that the court abused its discretion in ordering a new trial unless plaintiffs would remit a portion of their judgment. The power of the court to make a conditional order of this character is thoroughly settled in this state. (*Gregg v. San Francisco etc. R. R. Co.*, 59 Cal. 312; *Lee v. Southern Pac Co.*, 101 Cal. 118; *Domico v. Casassa*, 101 Cal. 411.)

It is true that in actions for damages for a personal tort the court should not substitute its judgment for that of the jury. The judge should not grant a new trial merely because he deems the verdict excessive, unless it is so excessive as to indicate that it was the result of passion or prejudice. But the motion for a new trial was based, in part, upon the ground of excessive damages given under the influence of passion or prejudice. The court sustained this contention, holding that

the damages were given under the influence of passion or prejudice. The learned judge had advantages over us in regard to the matter, and, besides, that he abused his discretion must clearly appear before we can interfere. It is especially so when such discretion is used in awarding a new trial which does not finally dispose of the matter.

From the testimony of Mrs. Sherwood the conduct of defendant certainly seems very offensive and boorish. His testimony, however, which the court must have believed, puts a different phase upon the matter. Manners are largely a matter of training and circumstance, and absence of decorum does not always imply malice or insult.

And the suit is not for an injury to the character and general reputation of Mrs. Sherwood. In her complaint she says that defendant meant to be and was understood to mean "that plaintiff was unreliable and unworthy of confidence as a teacher aforesaid, and in all respects in her profession was wholly disqualified for the exercise thereof." No insinuation was made that she did not enjoy and deserve the highest reputation as a woman.

The trial was two years after the alleged slander, and Mrs. Sherwood testified that she had found no difficulty in obtaining schools in Lake county since. She might have continued at the same school. The judge probably concluded that she had not been seriously injured by the slander, and that the jury had simply imposed a fine on the defendant for his bad manners.

It is not necessary to discuss the other points made on the motion for a new trial. They are, however, all involved on this appeal, for the court cannot foreclose the defendant as to any of them by granting a new trial upon some one ground. Except where one ground is as to the insufficiency of the evidence, and this only as to the ruling upon that one point, it is utterly immaterial here upon what ground the new trial was granted. The respondent may defend the ruling upon any point involved in his motion.

The order is affirmed.

McFarland, J., and Henshaw, J., concurred.

[S. F. No. 994. Department Two.—September 6, 1899.]

ALICE STEPHENSON, a Minor, by JOHN T. CHAMBERS, Guardian, etc., Appellant, v. J. C. DEUEL et al., Respondents.

PLEADING—DEMURRER—AMBIGUITY AND UNCERTAINTY—REVIEW UPON APPEAL.—Where the pleadings are verified, and there is a trial upon the merits, the appellate court will not reverse the judgment because of the overruling of a demurrer to a pleading for ambiguity and uncertainty, if it does not clearly appear that the demurring party was prejudiced thereby.

SHERIFF'S SALE FOR ALIMONY—ACTION TO SET ASIDE PROCEEDINGS—CLOUD UPON TITLE—CROSS-COMPLAINT TO QUIET TITLE—JOINDER OF CAUSES.—In an action against the purchaser of the husband's title at a sheriff's sale under execution for temporary alimony, and against the wife, to set aside as void the proceedings to enforce the alimony, and to remove the title claimed by the purchaser as an alleged cloud upon plaintiff's title, the purchaser, having been placed in possession under the sheriff's deed, may maintain a cross-complaint to quiet his title as against a void and fraudulent deed to the plaintiff from the husband's grantor; and such cross-complaint is not demurrable for misjoinder of causes, in improperly uniting the cause of action stated therein with that stated in the complaint.

ID.—TITLE OF HUSBAND—DELIVERY OF UNRECORDED DEED TO AGENT—VOID RECORDED DEED TO PLAINTIFF—FRAUD OF HUSBAND.—The delivery of an unrecorded deed to an agent of the husband for him as grantee, passed title to him, and left no title remaining in the grantor; and a subsequent deed, executed at the husband's request, from the same grantor to the daughter of the husband, the plaintiff in the action, without consideration, and which was executed and recorded for the purpose of preventing the property from being reached by the wife for alimony in the divorce suit, or by other creditors of the husband, was void and passed no title to the plaintiff irrespective of the question of fraud.

ID.—VALIDITY OF SALE FOR ALIMONY—SERVICE OF ORDER FOR COUNSEL FEES—COLLATERAL ATTACK.—The validity of the sheriff's sale and deed of the husband's property under an execution for temporary alimony, including counsel fees, cannot be collaterally attacked by a plaintiff who is found to have had no title, on the ground that the order for counsel fees was served upon the attorney for the husband and not upon the husband personally. It is immaterial to the plaintiff whether the order was properly served or not.

Id.—EVIDENCE—ISSUE OF FRAUD—FRAUDULENT INTENT OF HUSBAND.

—Where the issue as to the fraudulent purpose of the conveyance made to the plaintiff at request of the husband, was raised by the pleadings, evidence as to the fraudulent intent of the husband is material upon that issue.

APPEAL from a judgment of the Superior Court of Fresno County and from an order denying a new trial. Stanton L. Carter, Judge.

The complaint alleged title in plaintiff, and set forth facts leading to the allegation that the title of plaintiff was clouded and menaced by the sheriff's deed to the defendant Deuel, and prayed that the judgment under which the sale was made be declared void, that the sheriff's deed be canceled and declared void, and that the writ of assistance and all acts done thereunder be declared void. The demurrer to the defendant's cross-complaint for misjoinder of causes of acts is specified as follows: "That several cause of action have been improperly united in this: This action is to set aside a judgment, and the cross-complaint is an action to quiet title." Further facts are stated in the opinion.

Wiley J. Tinnin, for Appellant.

The order of April 18, 1892, as to counsel fees, was an order constituting a basis for contempt, and was void, not having been served on the defendant personally. (Code Civ. Proc. secs. 1015, 1016; *Johnson v. Superior Court*, 63 Cal. 578; *Galland v. Galland*, 44 Cal. 475; 13 Am. Rep. 167; *Powers v. Braly*, 75 Cal. 237; *Ex parte Rush*, 60 Cal. 5; *Ex parte Henshaw*, 73 Cal. 486; *In re Wilson*, 75 Cal. 580.) There was no judgment upon which execution could issue. (Code Civ. Proc., sec. 577.) The order for payment of counsel fees was not final either as to time or service. (*Broder v. Conklin*, 98 Cal. 360; *Hibberd v. Smith*, 67 Cal. 565; 56 Am. Rep. 726; *Quirk v. Falk*, 47 Cal. 453.) The first deed was not delivered to Stephenson, nor accepted by him, and did not transfer the property. (*Hibberd v. Smith*, *supra*; Civ. Code, sec. 1050; *Bank of Healdsburg v. Bailhache*, 65 Cal. 327.) The second deed was executed prior to the commencement of the divorce suit, and there was no proof of Stephenson's insolvency, or indebtedness, at that time. (*Windhaus v. Bootz*, 92 Cal. 617; *Bull v. Bray*, 89 Cal. 295.)

Frank H. Short, and John C. Deuel, for Respondents.

The court had jurisdiction of the order complained of (*Eichhoff v. Eichhoff*, 107 Cal. 42; 48 Am. St. Rep. 110; *Estate of Eichhoff*, 101 Cal. 600), and had power to enforce it by execution. (Civ. Code, sec. 137; *Van Cleve v. Bucher*, 79 Cal. 600.) The court had power to order payment of the entire amount, including counsel fees, within two days after notice, in modification of its previous order. (*Rose v. Rose*, 109 Cal. 544; *Storke v. Storke*, 99 Cal. 621; *Bohnert v. Bohnert*, 91 Cal. 428.) The execution for alimony was properly allowed. (Civ. Code, sec. 137; *Van Cleve v. Bucher*, 79 Cal. 602, 603.) The execution cannot be collaterally attacked, on the ground that it included too much. (*Hunt v. Loucks*, 38 Cal. 372; 99 Am. Dec. 404; *Newmark v. Chapman*, 53 Cal. 559. This is a collateral attack upon the judgment, execution and writ of assistance, which is not permissible. (*People v. Mullan*, 65 Cal. 396; *Reinhart v. Lugo*, 86 Cal. 395; 21 Am. St. Rep. 52; *Lyons v. Roach*, 84 Cal. 27; *Hunt v. Loucks*, 38 Cal. 372; 99 Am. Dec. 404; *Van Cleave v. Bucher*, *supra*; *Franklin v. Merida*, 50 Cal. 289; *Hibberd v. Smith*, 50 Cal. 511; *Newmark v. Chapman*, *supra*; *Boles v. Johnston*, 23 Cal. 226; 83 Am. Dec. 111; *Dorland v. Smith*, 93 Cal. 120; *Kelsey v. Dunlap*, 7 Cal. 160.) The statements of Stephenson as to the purpose of the deed to Alice were admissible in evidence to show his fraudulent intent. (*Silva v. Serpa*, 86 Cal. 243; *Ross v. Brusie*, 64 Cal. 245; *Ord v. Ord*, 99 Cal. 523; *Byrne v. Reed*, 75 Cal. 277; *Redfield v. Buck*, 35 Conn. 328; 95 Am. Dec. 247, and cases cited in the note 245, 246.) The delivery to McKenzie vested title in Stephenson unconditionally, taking the testimony of McKenzie and Dyas as true, which is sufficient to support the finding of delivery, as matter of fact. (*Hastings v. Vaughn*, 5 Cal. 315; *Hibberd v. Smith*, 67 Cal. 547-56; 56 Am. Rep. 726; *Denis v. Velati*, 96 Cal. 223; *Dimmick v. Dimmick*, 95 Cal. 323; *Mowry v. Heney*, 86 Cal. 471, 475-77; *Ward v. Dougherty*, 75 Cal. 240; 7 Am. St. Rep. 151; *Bury v. Young*, 98 Cal. 446, 452.) The date of delivery of the deed to the plaintiff was properly shown to have been subsequent to its date. (*Treadwell v. Reynolds*, 47 Cal. 171.) The cross-complaint was properly filed as affecting the property to which the action relates. (Code Civ. Proc., sec. 442; *Hills v. Sherwood*, 48 Cal. 386; *Winter v. McMillan*, 87 Cal. 256, 265, 266; 22 Am. St. Rep.

243; *Colton etc. Co. v. Raynor*, 57 Cal. 588-94; *Waugenheim v. Graham*, 39 Cal. 169; *Taylor v. McLain*, 64 Cal. 513; *Snow v. Holmes*, 71 Cal. 142-49; *Van Bibber v. Hilton*, 84 Cal. 585, 587, 588; *Nunez v. Morgan*, 77 Cal. 427-29.) The sheriff's deed was as much the deed of Stephenson as though he had made it himself. (*Blood v. Light*, 38 Cal. 653; 99 Am. Dec. 441; *Clark v. Sawyer*, 48 Cal. 133; *Montgomery v. Robinson*, 49 Cal. 258; *Bullard v. McArdle*, 98 Cal. 356; 35 Am. St. Rep. 176.)

CHIPMAN, C.—Berdenia F. Stephenson brought an action for divorce against William M. Stephenson on February 13, 1892, in the superior court of Fresno county. On that day the court made an order requiring defendant to pay a counsel fee of one hundred and fifty dollars, and on April 18th the court made another order reciting the former order and defendant's refusal to obey it, and ordering the fee to be increased to three hundred dollars, and that it, together with certain alimony previously ordered, be paid within two days after notice of the making of the order, and that in case of default execution issue to enforce payment. A copy of this last order was served on defendant's attorney April 19th. On May 20th an execution was issued for the unpaid balance, which was levied upon the right, title, and interest of William M. Stephenson (defendant in the divorce suit) in and to certain lots situated in the city of Fresno, the lots in controversy, and the same were sold by the sheriff to defendant Deuel on July 14, 1892, and a certificate of purchase issued to him, and on January 17, 1893, a deed was made to him by the sheriff and a writ of assistance was issued January 23, 1893, under which said William M. Stephenson, then in possession, was removed from the land and Deuel put in possession thereof, which he still holds.

Plaintiff claims title to the land under deed from one Dyas and wife, dated February 1, 1892. It is in support of this title that plaintiff now seeks to have the proceedings set aside as void under which Deuel claims.

Defendant Deuel in his answer avers that Dyas conveyed the lots to William M. Stephenson prior to the alleged conveyance to plaintiff by Dyas, and that Stephenson became

and at the time of the levy was the owner of the lots, but that the deed was not recorded, though delivered and the consideration paid; and that pending the divorce proceedings between Berdenia and William the latter caused Dyas to convey the lots to William's minor child (plaintiff) with the fraudulent purpose of preventing his wife Berdenia from getting the same, and to prevent the collection of the money ordered to be paid as alimony and counsel fees, and in fraud of his creditors generally. By cross-complaint defendant Deuel asked to have his title quieted. The court gave judgment for defendant, from which and from the order denying a new trial plaintiff appeals.

1. The ruling upon demurrer to defendants' amended answer on the ground of uncertainty and ambiguity cannot now avail plaintiff. The pleadings are verified, and defendants' answer is deemed controverted. Where there is an answer and trial on the merits, the court will not reverse the judgment for ambiguity and uncertainty, unless it clearly appears that demurrant was prejudiced by the alleged infirmity in the pleading. It does not so appear here.

2. The demurrer to defendants' cross-complaint on the ground that several causes of action were improperly united was rightly overruled. Defendant could have the relief asked in this action by way of cross-complaint. (Code Civ. Proc., sec. 442.)

3. Several of the findings are attacked for insufficiency of the evidence to justify them.

Finding 3 is to the effect that plaintiff did not become the owner of the property in question by the deed of J. C. Dyas and wife, dated February 1, 1892, or otherwise. The evidence tends to show that prior to the delivery of this deed Dyas sold and conveyed the lots to W. M. Stephenson by deed, which was delivered for him to his agent, one McKenzie, who testified that it was still in his office. Another witness testified that she heard Stephenson in the latter part of January, 1892, say that he had bought the property in controversy. There is evidence tending to show that he was occupying the premises when Deuel caused the execution to be levied. The deed under which plaintiff claims bears date February 1st, but there is evidence from which the inference may

be drawn that it was first executed and acknowledged by Mrs. Dyas at Santa Cruz on March 29, 1892, and that it was afterward sent to McKenzie at Fresno, and then executed and acknowledged by Mr. Dyas before McKenzie on March 31, 1892. The acknowledgments are dated respectively March 29 and March 31, 1892. Plaintiff claims and there is some evidence tending to show that Stephenson instructed McKenzie to prepare a deed from Dyas and wife to plaintiff, after the deed was executed conveying the property to him, as he said the former deed was a mistake and he wanted the lots to go to his child (plaintiff), and that McKenzie did, by Stephenson's direction, prepare the deed which bears date February 1st. This first deed, however, had been delivered to McKenzie for Stephenson and as his agent. The deed to plaintiff was recorded April 2, 1892, by McKenzie at the direction of W. M. Stephenson and his son, John M. Stephenson, and the latter testified that he paid Dyas for the lots from his own money. There is evidence that the money came from a sale of property by W. M. Stephenson, the proceeds of which he gave his children, and that Dyas got two thousand six hundred dollars, the consideration for the lots out of a portion of the money paid on account of this sale. This money was handled by McKenzie, and he testified that when he paid Dyas he charged the money to the account of John M. Stephenson. There is some evidence tending to show that W. M. Stephenson caused the deed to be made to his daughter because of the divorce proceedings, and because he wanted to prevent his wife from getting any of his property. We think, however, aside from the question of fraud raised by the answer, that the execution of the deed by Dyas and its delivery by Dyas to McKenzie for Stephenson divested Dyas of the title and vested the title in Stephenson. When Dyas undertook to convey the property to plaintiff he had nothing to convey. No question of purchase by plaintiff for a valuable consideration without notice is presented. It appears that plaintiff paid no consideration, and it does not appear that she knew that the property was conveyed to her at the time Dyas made the deed under which she claims.

Finding 5 is that the order of April 18, 1892, as to counsel fees, was served on the counsel of Stephenson, defendant in the divorce action, and that both counsel and Stephenson had

knowledge of the making and entry of the order. The order, in fact, was served upon Stephenson's attorney, but not on Stephenson. Counsel for appellant contends that the order should have been served upon Stephenson personally. (Citing Code Civ. Proc., secs. 1015, 1016, and numerous cases.) Whether the service was sufficient or not, appellant is in no position to complain. The court found, as we have seen, upon sufficient evidence, that plaintiff had no title to or interest in the lots. This is a collateral attack upon the proceedings under which Deuel claims title. Unless plaintiff had some interest in the property, it is immaterial whether the order above referred to was properly served. This view of the matter disposes of appellant's objection to findings 6 to 13, inclusive. Finding 14 is that Dyas and wife, about February 1, 1892, executed their deed conveying the property to W. M. Stephenson, which deed was delivered to W. H. McKenzie and accepted by him as the agent of and for Stephenson; that this deed was retained by McKenzie but not recorded, and that thereafter, on or about March 25, 1892, and before the purchase price had been paid by Stephenson to Dyas, said Stephenson, "with the purpose and intention and designing to cheat, hinder, and delay and defraud defendant Berdenia F. Stephenson, who was then his wife, and to prevent said real property from being subject to the order and process of the court, and the payment of the expenses, counsel fees, and alimony, which had been then, or which he anticipated or expected would be, awarded against him" in the divorce action then pending, et cetera, did procure said deed to be made from Dyas and wife to plaintiff, then a minor and daughter of said W. M. Stephenson, and to be delivered to said McKenzie, and thereupon said W. M. Stephenson caused McKenzie to pay Dyas two thousand six hundred dollars, the purchase price of said real property, and that said last-named deed was procured to be made "for the purpose of hindering, delaying, and defrauding the said Berdenia, and not otherwise; that about February 13, 1892, she commenced her said action for divorce, and said action was pending thereafter at all times until January 10, 1893, upon which last date W. M. Stephenson died." Other subdivisions of this finding relate to matters concerning the proceedings in the action for divorce under which defendant

Deuel claims title. There was evidence tending to show that about the time the divorce was commenced, both before and after, Stephenson declared that his wife should have none of his property, and that to prevent her from getting any of it he would "put the property out of his hands." A witness testified that Stephenson told witness he had bought the lots in controversy for two thousand seven hundred dollars, and after that, "when Mrs. Stephenson commenced suit against him, he said she would not get a dollar of his property; that he would put the property out of his hands; that he would give it to Alice; that he would deed it to Alice, his daughter." There was much other testimony to like effect. There was also evidence introduced by plaintiff tending to contradict the evidence of defendant, but at most it left the evidence as to the transfer to plaintiff in conflict, as also the evidence as to the delivery of the deed to Stephenson. It cannot be said there was not sufficient evidence to sustain this finding. And if this were not so we cannot see that plaintiff was injured by the finding, since Dyas had no title to convey when he made the deed to plaintiff through which alone plaintiff claims.

4. There are numerous assignments of error in admitting evidence over plaintiff's objection tending to show that the conveyance to plaintiff was fraudulent. Counsel for plaintiff has not stated why he objected to the evidence as immaterial, but I infer that the objection rests upon the theory that evidence as to Stephenson's alleged fraudulent intent was outside the issues. The issue of fraud was presented by the pleadings, and the evidence was material upon that issue.

5. It is contended that the decision is not justified by the evidence, unless it be held that Deuel's title was good, and that before it can be held good the court must hold the service of notice of the order under which Deuel claims to have been properly made upon the attorney of Stephenson in the divorce case. When this action was commenced Deuel was in possession under the deed of the sheriff. This was sufficient to have his title quieted as against the deed of Dyas to plaintiff, which the court found, upon sufficient evidence, conveyed no title and was void. (*Pierce v. Felter*, 53 Cal. 18; *McKinnie v. Shaffer*, 74 Cal. 614; *Pennie v. Hildreth*, 81 Cal. 127.)

There are some assignments of error, but they appear to depend in one way and another upon matters already noticed, and do not require special consideration.

Discovering no reversible error, I advise that the judgment and order be affirmed.

Cooper, C., and Britt, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are affirmed.

McFarland, J., Temple, J., Henshaw, J.

[S. F. No. 932. Department Two.—September 6, 1899.]

E. J. CASEY, Respondent, v. JOSEPH LEGGETT, Appellant and Others, Defendants.

FRAUDULENT CONVEYANCE—FINDINGS—CONSIDERATION—SUFFICIENCY OF EVIDENCE—REVIEW UPON APPEAL.—Where a conveyance by an insolvent debtor to his brother, antedating an attachment and execution sale of the interest of the debtor, was assailed as fraudulent by the execution purchaser, a finding that the conveyance was executed for a valuable consideration in payment of large indebtedness of the debtor to his brother, is sufficiently supported by their testimony to such consideration, if not contradicted or impeached otherwise than by its own weakness, though it may seem in some respects inherently improbable to the appellate court, which cannot substitute its opinion upon the weight of testimony for that of the trial court sitting as a jury to try the case.

ID.—DELIVERY OF DEED TO ATTORNEY OF GRANTEE.—A finding that the deed was delivered to the brother as grantee is sufficiently supported by testimony that it was drafted by his attorney at his request, and forwarded to the grantor for execution, and was returned to the attorney and held by him for the grantee after its execution.

ID.—PRESUMPTION OF TITLE—BURDEN OF PROOF AS TO FRAUD.—The deed having been executed for a valuable consideration and delivered to the grantee, the law presumes that the title was rightfully acquired by him; and the burden of proof is upon the execution purchaser to show that it was conveyed with fraudulent intent on the part of the grantor, and that the grantee purchased with knowledge of such fraudulent intent, or under such circumstances as to put him upon

inquiry as to the fraud of the grantor, and was not taken by him in good faith.

ID.—GOOD FAITH OF GRANTEE—SUPPORT OF FINDING—ABSENCE OF PROOF.

—A finding in favor of the good faith of the grantee as a purchaser for value without notice of fraud on the part of the grantor, is supported by the absence of proof of facts and circumstances putting him on inquiry as to such fraud.

ID.—CIRCUMSTANTIAL PROOF OF FRAUD—SUSPICION INSUFFICIENT.—

Fraud may be proved by circumstantial evidence, but evidence of the facts and circumstances from which fraud may be inferred must amount to proof of fraud; and to create a mere suspicion thereof is not sufficient to overcome the presumption of law in favor of the fair dealing of the parties.

ID.—IMMATERIAL FINDING—INTENT OF GRANTOR.—Where the court finds that the grantee was a bona fide purchaser for value without notice of any fraud on the part of the grantor, a finding as to the intent of the grantor in making the conveyance is immaterial.

ID.—ISSUE AS TO CONSIDERATION—CONJUNCTIVE DENIAL—TRIAL OF ISSUE—OBJECTION UPON APPEAL.—The objection that no issue was raised upon an averment as to want of consideration for the deed in controversy, by reason of a conjunctive denial in an answer, cannot be urged for the first time upon appeal, where the case was tried in the superior court upon the theory that the denial was sufficient to raise an issue as to the consideration, and the answer might have been amended to meet the objection if raised in the superior court.

ID.—CONVEYANCE BY BONA FIDE PURCHASER—PROTECTION OF GRANTEE.

—A conveyance by a bona fide purchaser without notice of the fraud of his grantor passes a perfect title to his grantee, as against an execution purchaser claiming under the original grantor, and it is immaterial whether any consideration was paid therefor, or whether the conveyance was intended as a mortgage as between the parties, or whether the grantee was a bona fide purchaser, or had or had not notice of the fraud of the original grantor.

ID.—ACTION TO QUIET TITLE—POSSESSION—IMMATERIAL FINDING.—

Possession is not essential to the maintenance of an action by the owner of land to quiet his title thereto; and a finding upon that question is immaterial and it is immaterial whether it is supported by the evidence.

ID.—EVIDENCE—REPETITION OF EXAMINATION OF WITNESS.—It is not prejudicial error for the court to disallow questions asked of a witness upon a third cross-examination, which were merely in repetition of questions previously asked of the witness, and answered by him.

ID.—LEADING QUESTIONS—DISCRETION.—It is in the discretion of the trial court to permit a party to ask leading and suggestive questions of his witness, and a case will not be reversed on that ground, unless there is a manifest abuse of discretion.

ID.—LETTER FROM STRANGER—ADVICE TO INSOLVENT TO CONVEY TO WRITER.—A letter from a stranger addressed to the insolvent debtor, and advising him to make a conveyance to the writer to prevent a threatened attachment, which was not acted upon by the insolvent, nor consented to by any of the parties or their privies, is inadmissible in evidence.

ID.—EVIDENCE OF CONSIDERATION—BORROWING OF MONEY GIVEN—PAYMENT OF DEBT BY DEED.—Upon the issue as to the consideration of the conveyance by the insolvent to his brother, evidence is relevant and admissible to show that at a time when the debtor was not insolvent he gave two thousand dollars to his brother from the proceeds of land deeded to him by his father, and that the money thus paid to his brother was afterward borrowed by him, and that the payment of the debt for such borrowed money was the consideration for the deed. He had a right, then, to make such gift; and the payment of the indebtedness to his brother for the borrowed money was a consideration sufficient to support the deed.

APPEAL from a judgment of the Superior Court of Sonoma County and from an order denying a new trial. R. F. Crawford, Judge.

The facts are stated in the opinion.

James G. Maguire, for Appellant.

The findings are against the evidence. The plaintiff, taking under a quitclaim deed, took subject to all equities against Leo Clar, the original grantee of the insolvent debtor. (*Allison v. Thomas*, 72 Cal. 564; 1 Am. St. Rep. 89; *Johnson v. Williams*, 37 Kan. 179; 1 Am. St. Rep. 243; *Snow v. Lake*, 20 Fla. 656; 51 Am. Rep. 625.) The deed is shown by the evidence to have been intended as a mortgage, and did not pass title, and the mortgagee cannot maintain a suit to quiet title. (*Winter v. McMillan*, 87 Cal. 264; 22 Am. St. Rep. 243; *Harrigan v. Mowry*, 84 Cal. 456.) The deed from L. F. Clar, the insolvent debtor, to his brother, Leo H. Clar, was intended to defraud the creditors of L. F. Clar, and was void as against the appellant. (*Judson v. Lyford*, 84 Cal. 507; *Bull v. Ford*, 66 Cal. 177; Civ. Code, sec. 3439.) It must be presumed that Leo H. Clar knew of the insolvency of his brother, there being no finding to the contrary. (*Bull v. Bray*, 89 Cal. 287.) The proof shows that T. J. Butts was the attorney for L. F. Clar, and not for Leo Clar, and the deed was not delivered to L. H. Clar and did not pass title

to him, prior to the attachment placed upon the property. (Civ. Code, sec. 1054; *Dyson v. Bradshaw*, 23 Cal. 528; *Barr v. Schroeder*, 32 Cal. 610; *Fitch v. Bunch*, 30 Cal. 208; *Calhoun County v. Emigrant Co.*, 93 U. S. 124.) The finding that there was a valuable consideration for the deed is outside the issues, the want of consideration having been conjunctively denied; and the finding, being against the admission of the pleading, cannot be sustained. (*Traverso v. Tate*, 82 Cal. 170; *Silvey v. Neary*, 59 Cal. 97; *Tracy v. Craig*, 55 Cal. 91.) The fraudulent intent on the part of the grantor being shown, the burden of proof was upon the plaintiff to show that a valuable consideration was paid for the property. (*Ross v. Wellman*, 102 Cal. 4; *Jones v. Simpson*, 116 U. S. 610.) When it appears from the evidence and the legal presumptions of fact arising therefrom, that a conveyance was voluntary and was executed for the purpose of defrauding the creditors of the grantor, a finding to the contrary will be set aside by the supreme court. (*Daugherty v. Daugherty*, 104 Cal. 221; *Godfrey v. Miller*, 80 Cal. 424; *Judson v. Lyford*, *supra*.) The letter written by Miss Burnett to L. F. Clar requesting a deed to her to defeat his creditors was admissible for the purpose of explaining and illustrating his act in subsequently deeding the property to his brother Leo H. Clar. (*Spies v. People*, 122 Ill. 1; 3 Am. St. Rep. 320; *People v. Colburn*, 105 Cal. 648, 651; *Wright v. Tatham*, 7 Ad. & E. 313, 389; 2 Jones on Evidence, sec. 301; 1 Taylor on Evidence, pt. 2, sec. 574; 1 Greenleaf on Evidence, sec. 101.)

William H. Jordan, and Anson Hilton, for Respondent.

A valuable consideration for the deed to Leo H. Clar was proved, and that shifted the burden upon the appellant to show that plaintiff's grantor, Leo H. Clar, knew of the fraudulent intent of the grantor. (*Ross v. Wellman*, 102 Cal. 1; *Jones v. Simpson*, 116 U. S. 610.) There was no proof tending to show that the deed to plaintiff was intended as a mortgage. If the intention is absent there is no mortgage. (*Montgomery v. Spect*, 55 Cal. 352; *People v. Irwin*, 18 Cal. 117; *Low v. Henry*, 9 Cal. 538; *Taylor v. McLain*, 64 Cal. 513.) There was no agreement to reconvey. (1 Jones on Mortgages, sec. 241; *Fuller v. Pratt*, 10 Me. 197.) Defendant not

being a creditor of plaintiff or his grantor cannot question the consideration of the deed to plaintiff or the intention of the parties thereto. Leo H. Clar had the right to give the property to plaintiff, and the consideration is immaterial. (*Seward v. Jackson*, 8 Cow. 406-30; *Halliday v. Hart*, 30 N. Y. 480; *Gifford v. Carvill*, 29 Cal. 589; *Goad v. Moulton*, 67 Cal. 536; *Gillan v. Metcalf*, 7 Cal. 137.) Appellant cannot object here for the first time that there was no issue as to the consideration of the deed to Leo H. Clar from L. F. Clar, the trial having been had upon that issue. (*Moore v. Campbell*, 72 Cal. 251; *Illinois T. & S. Bank v. Pacific Ry. Co.*, 115 Cal. 297; *Sukeforth v. Lord*, 87 Cal. 399; *King v. Davis*, 34 Cal. 100; *Horton v. Dominguez*, 68 Cal. 642.)

COOPER, C.—Action to quiet title. Judgment for plaintiff. Motion for new trial denied. This appeal is from the judgment and order. On July 24, 1893, and prior thereto, one L. Frank Clar was the owner and seised in fee of the lands in controversy; and was then in insolvent circumstances and owed, among others, one Adolph Sommer the sum of four thousand eight hundred dollars, besides interest. On said date the said L. Frank Clar made a bargain and sale deed of said lands to his brother, Leo H. Clar. On September 11, 1893, said Sommer assigned the indebtedness so due him from L. Frank Clar to defendant Leggett, and on September 21, 1893, Leggett commenced an action in the proper court against said L. Frank Clar and had a writ of attachment issued, which said writ was levied upon the said lands September 22, 1893. On the following day, September 23d, the deed made by said L. Frank Clar to his brother, Leo H., was placed on record in the county where the lands are situated. October 15, 1894, said Leo H. Clar made a quitclaim deed of said lands to plaintiff, and on the 25th of the same month said Leggett recovered judgment against said L. Frank Clar. On December 17, 1894, the defendant Leggett purchased the said premises at execution sale under his said judgment, the same having been sold as the property of said L. Frank Clar. The defendants, other than Leggett, made default. Leggett, by his answer and cross-complaint, denied the execution, delivery, and consideration of the deed from L. Frank Clar to Leo H. Clar and of the deed from Leo H. Clar to plaintiff,

and asked the court to set aside the said deeds, upon the ground that they were fraudulent, made without consideration, and that the lands were held in secret trust by plaintiff for said L. Frank Clar. The plaintiff denied the averments of the cross-complaint, and upon the issues so made the case went to trial. The court found in favor of plaintiff upon the material issues, and the main contention of the defendant is the insufficiency of the evidence to justify these findings. The court found that the deed made by L. Frank Clar to his brother Leo was made for a valuable consideration, to-wit, in consideration of an indebtedness due from said L. Frank Clar to his said brother, amounting to about \$4,237.87. As this finding is the most vital one, and the one most earnestly attacked, we will first examine it. L. Frank Clar testified that his father, before his death, left \$670 in a sack for his brother Leo H., who was then a mere boy, and that the father, among his last requests, asked him to take care of it and keep it for Leo. That his father deeded him a lot in San Francisco about the year 1880 for himself and his brother Leo. That this property was sold for \$5,000, and of this sum one-half of it belonged to Leo. That \$2,000 of the amount realized from the sale of the real estate and the \$670, and \$680 due for wages, amounted, with interest, on July 24, 1893, to \$4,600 or \$4,700. That the money after the sale of the lot was placed in Leo's hands, or, rather, \$2,000 of it, together with the \$670 and \$500 that witness had from other sources. That Leo gave witness permission to use this money, and that witness did use it in his own business, and was thus indebted to his brother Leo on the twenty-fourth day of July, 1893, in a sum exceeding \$4,600. Leo H. Clar testified that he went with his older brother, L. Frank, to the safe deposit vault, and the money was placed in his hands, and he gave his brother L. Frank permission to use it in his own business. Ivan Clar, another brother, testified to seeing and counting the \$670 tied up in a sack in the vault of the safe deposit company with a tag on it bearing his brother Leo's name. It further was testified by the brothers, Leo and Frank, that after Leo attained his majority he worked for Frank for seventeen months, and that such services were worth \$40 per month, amounting to \$680, and that Leo had never been paid. There is other testimony, but the above is sufficient to support the

finding as to consideration. The brothers, who were witnesses for each other, do not agree as to all the facts, and there is a certain degree of improbability about much of the evidence that leaves it to our minds unsatisfactory. If we had to pass upon it in the first instance we are not at all certain that we would find as did the judge of the court below. But the evidence is not contradicted nor impeached except by its own weakness, and the judge of the court below has found it true. As he saw and heard the witnesses, he was more capable of judging of the credit to be given to their testimony than we could possibly be by examining the record. As we understand the rule, we have not the power to disturb a finding of fact if there is substantial evidence to support it. Unlike the court below, when trying the cause without a jury, we possess none of the functions of the jury, and therefore cannot substitute our opinion in the place of his and say which testimony is true and which is false. (*Lick v. Madden*, 36 Cal. 212.)

It is further claimed that the evidence is insufficient to support the finding that the deed made to Leo H. Clar was delivered. The witness Butts testified that at the request of and as agent of Leo he prepared the deed and sent it to L. Frank Clar at Boston, to be executed and returned to him. That the deed was executed and returned to witness, and that he received it and took possession of it for Leo. The witness Leo H. Clar says that he employed Butts as his attorney to get the deed for him. We think the evidence (which is not contradicted) amply sufficient to support the finding. The deed having been made for a valuable consideration and delivered to grantee, the law presumes that the grantee rightfully acquired the title to the property. The burden was therefore upon the defendant, after such consideration and delivery is established, to prove a fraudulent intent on the part of the grantor, and that the grantee was in some way a party to such fraud by purchasing with knowledge of such fraudulent intent or under such circumstances as should put him on inquiry as to the fraud on the part of the grantor. (*Jones v. Simpson*, 116 U. S. 614; *Ross v. Wellman*, 102 Cal. 4.) The court found that at the time of the making of the conveyance from L. Frank Clar to Leo H., that Leo was not privy to or a participator in any fraud whatsoever, and that

Leo never conspired with his brother nor anyone else in any fraudulent attempt to convey or dispose of said property. This finding does not appear to be directly attacked in appellants brief, but the argument against it is only from inference and a narration of circumstances. The burden was upon the defendant to show that Leo was in some way a party to the fraud and that the deed was not taken by him in good faith. In the absence of proof—that is, in the absence of such facts and circumstances—that the court would be justified in the conclusion that Leo was in some way connected with or a party to a fraudulent intent on the part of Frank H., the finding would be justified.

As was said by this court in *Levy v. Scott*, 115 Cal. 41: "It is quite true that evidences of fraud are not left lying patent in the sunlight; that fraud itself is always concealed, and that the truth is to be discovered more often from circumstances, from the interests of the parties, from the irregularities of the transaction, coupled with injury worked to an innocent party, than from direct and primary evidence of the fraudulent contrivance itself. Nevertheless, the evidence of these matters, facts, and circumstances, taken together, must amount to proof of fraud, and not a mere suspicion thereof, for the presumption of the law, except where confidential relations are involved, is always in favor of the fair dealing of the parties."

If we are correct in what has been said, the finding as to the intent of L. Frank Clar in making the deed to his brother Leo is not material, and it is not necessary to discuss it. It is claimed that the finding that the deed from Leo H. Clar to plaintiff was for a valuable consideration was outside the issues, contrary to the admissions in the pleadings, and that the said deed was in fact a mortgage given as security only. The technical argument is urged that the plaintiff, in denying the cross-complaint, literally denied "that the deed was wholly voluntary and without any consideration whatever," and that such denial was virtually an admission of the allegation of the cross-complaint as to want of consideration. If counsel had urged the objection in the court below, it would probably have resulted in an amendment to the answer to the cross-complaint in furtherance of justice, and in order that the case might be tried upon its merits. This course was

not pursued, and the case was fully tried as though the issue was properly made by the pleadings. Counsel will not be allowed to try the case upon the theory that the issue was properly before the court below, and thus entice his adversary into a trap to be sprung in this court at the last moment. This court does not countenance technical objections to pleadings when the case was tried in the court below upon the theory that the issues were properly made. (*Cushing v. Pires*, 124 Cal. 663.) We do not think the defendant is in a position to claim that the deed from Leo H. Clar to plaintiff was not made in good faith, or that it was intended as a mortgage. He is not a creditor of Leo H. Clar, nor of the plaintiff, and if the deed was a gift, it would not in the least concern the defendant. The deed to Leo H. Clar having been made in good faith and for a valuable consideration, he could afterward transfer the title acquired by the deed to anyone, whether such person was a purchaser in good faith or not. A purchaser without notice of the fraud may sell the property to a person who has notice, for the law does not know of an unencumbered estate which is forfeited by alienation, or for which the owner cannot pass a good title to the purchaser. (Bump on Fraudulent Conveyance, sec. 499, and cases cited.)

Considerable space is taken up in appellants' brief in the attempt to show that the finding that plaintiff was in possession of the lands at the time of the commencement of the action is not supported by the evidence. The evidence is sufficient, but the finding is wholly immaterial. The owner of land does not have to be in possession in order to enable him to maintain an action to quiet title. (Code Civ. Proc., sec. 738; *People v. Center*, 66 Cal. 555; *Brusie v. Gates*, 80 Cal. 463.) Many technical objections are made to the rulings upon the admission or rejection of evidence. The first one argued is the ruling of the court in sustaining plaintiff's objection to the defendants' question asked of the witness Leo H. Clar, to wit: "What statement did you make to Mr. Butts at the time you told him to get the deed? How did you tell him? Did you give him any instructions about getting it?"

The court sustained the objection upon the ground that the question "had already been answered and gone over." We

think the ruling is not prejudicial error. The witness had been fully examined and cross-examined and then re-examined and recross-examined, and again re-examined and recross-examined, and this question was asked at the latter end of the third cross-examination and had been substantially gone over before. The witness was again called by defendant and examined and cross-examined some three or four times. The next objection is to a large number of questions asked by plaintiff's counsel, upon the ground that they are leading and suggestive. It is the settled rule in this state that the allowance of leading questions is in the discretion of the trial court, and that a case will not be reversed on such ground unless there is a manifest abuse of such discretion. (*White v. White*, 82 Cal. 452; *Kyle v. Craig*, 125 Cal. 107.) A Miss Burnett testified by deposition, and it appeared that she wrote a letter to L. Frank Clar prior to the time the deed was made by Frank to Leo. The letter was written by Miss Burnett to Frank and not to Leo or any party now interested in this case. It appears that Miss Burnett knew that Frank was indebted to Sommer, and she was afraid that Sommer might attach his property or cause him trouble. She advised Frank to deed his property to her until he could settle with Sommer, and then she would reconvey it. The court excluded the portion of Miss Burnett's letter relating to or rather advising such conveyance, and we think the ruling correct. The advice was never acted upon, and in fact Frank refused to so deed his property, and told Miss Burnett that he would not do it as it would not be honest. It would be contrary to all rules of evidence to allow a written suggestion of a stranger to the litigation to which no one of the parties or their privies consented to be admitted in evidence. The case quoted by counsel—*People v. Colburn*, 105 Cal. 651—is directly against him. It is said in the opinion: "The letter was a statement of a third party in nowise connected with defendant, and was not made under the sanction of an oath, and not admissible. The possession of unanswered letters is not such evidence of acquiescence in their contents as to make them admissible in a civil case, and a letter found upon a prisoner when arrested has been held to be no evidence of the facts stated in it."

If the proof had shown that L. Frank Clar acted upon the advice given in the letter, or that he requested it or in any way agreed to it, then it would be admissible for the purpose of showing his fraudulent intent. His fraudulent intent, however, would not change the result of the finding that the deed was made to Leo H. in good faith and for a valuable consideration. We think the testimony tending to show a gift of \$2,000 from L. Frank Clar to his brother Leo was within the issues made by the pleadings. The cross-complaint alleged that the deed to Leo was without consideration. The answer to the cross-complaint denied this. If L. Frank Clar, at the time when he was not indebted, made a gift of \$2,000 to his brother, he had the right to do so. If he afterward borrowed it, the payment of the debt would be a good consideration for the deed. As has been said before, the truth or falsity of the evidence was left to the trial judge and is not for this court.

We advise that the judgment and order be affirmed.

Gray, C., and Chipman, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are affirmed.

McFarland, J., Henshaw, J., Temple, J.

Hearing in Bank denied.

[S. F. No. 1144. Department Two.—September 6, 1899.]

BURRITT N. DOW et al., Appellants, v. REVILLA A. SWAIN et al., Respondents.

EXCHANGE OF LAND FOR FOUNDRY STOCK—FRAUD—RESCISSION—FINDINGS—RELIANCE UPON FALSE REPRESENTATIONS.—In an action to rescind an exchange of land for foundry stock, fraud justifying the rescission is established by findings that plaintiffs were induced to make the exchange solely by reliance upon materially false and fraudulent representations of fact by the defendants as to the solvency, profits, and assets of the corporation owning the foundry, and that the value of the stock could have been approximately ascertained

only by a thorough investigation by experts of the value of the assets, property, books, and business of the corporation, and that plaintiffs were ignorant of the falsity of the representations, and acted upon them as true.

ID.—ABSENCE OF CONFIDENTIAL RELATIONS—POSSIBILITY OF INVESTIGATION—JUDGMENT NOT SUPPORTED—REVERSAL UPON APPEAL.—Further findings that there was no relation of trust or confidence between the parties, that plaintiffs were not fraudulently induced to forbear inquiry into the truth of the representations, and that “they might have ascertained their falsity by making the necessary investigations and employing the proper means to that end,” cannot overcome the effect of the other findings, or sustain a judgment for the defendants upon the entire findings; and judgment for the plaintiffs upon the findings will be ordered upon appeal.

ID.—NEGLECT OF EXAMINATION—CONCLUSION OF LAW—REASON FOR DECISION.—A finding placed in the conclusion of law “that by reason of their neglect and failure to properly examine the property which they took in exchange for their property, and to investigate and ascertain its value, equity will not grant relief to the plaintiffs,” is not a misplaced finding of fact, nor properly a conclusion of law, but is in its nature the statement of a reason for decision.

ID.—RIGHT TO RELY UPON REPRESENTATIONS—INEQUALITY OF KNOWLEDGE—PRESUMPTION.—When a representation is made concerning facts of which the party making it has or is supposed to have knowledge, and the other party has no such advantage, and has not investigated for himself or been afforded the means of investigation, and begun to make inquiries, and the representation is not as to generalities, the knowledge of which is equally within the reach of both parties, it will be presumed that the party to whom the representations were made relied upon them, and he is justified in doing so.

ID.—IMPERFECT EXAMINATION BY BUYER—FAULT OF SELLER.—When the seller knows the facts and the buyer is ignorant, and to the knowledge of the seller the buyer relies upon the false representations, equity will not refuse relief because an imperfect examination was made by the buyer because of the false representations, and especially if means were used by the seller to prevent a perfect examination by the buyer.

ID.—POSITIVE ASSERTIONS WITHOUT WARRANT.—One who makes positive assertions without warrant cannot excuse himself by saying that the other party need not have relied upon them; but he must show that his representations were not in fact relied upon.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a motion to vacate the judgment and to render judgment for the plaintiffs. J. C. B. Hebbard, Judge.

The facts are stated in the opinion of the court.

Boyd & Fifield, for Appellants.

The facts found do not sustain the conclusions of law, or support the judgment. A vendor who has by fraud circumvented his vendee by misrepresentation as to facts within his knowledge, the falsity of which is not known to the vendee, cannot say to his victim, "You are to blame for trusting to my statements, for you should have investigated for yourself." (*Bank of Woodland v. Hiatt*, 58 Cal. 234; *Marston v. Simpson*, 54 Cal. 189; *Senter v. Senter*, 70 Cal. 619; *Loaiza v. Superior Court*, 85 Cal. 30; *Groppengiesser v. Lake*, 103 Cal. 37; *Yeomans v. Bell*, 79 Hun, 215; *Sutton v. Morgan*, 158 Pa. St. 204; 38 Am. St. Rep. 842; *Fargo Gas etc. Co. v. Fargo Gas etc. Co.*, 4 N. Dak. 219; *Foley v. Holtry*, 43 Neb. 133; *Hooch v. Bowman*, 42 Neb. 80; 47 Am. St. Rep. 691; *Turner v. Houpt*, 53 N. J. Eq. 526; *Nelson v. Carlson*, 54 Minn. 90; *Handy v. Waldron*, 19 R. I. 618; *Olcott v. Bolton*, 50 Neb. 779; *Redgrave v. Hurd*, L. R. 20 Ch. Div. 1, 12-25; *Battelle v. Cushing*, 21 D. C. 59, 72; *Cornell v. Crane*, 113 Mich. 460; 1 Bigelow on Fraud, 523-28.)

A. E. Bolton, and Louis H. Sharp, for Respondents.

The findings that there was no investigation or use of proper means to that end, and that there was no relation of trust and confidence between the parties, and that the defendants did fraudulently induce plaintiff to forbear inquiry, sustain the judgment for defendants. (*Slaughter v. Gerson*, 13 Wall. 383; *Peabody v. Phelps*, 9 Cal. 222; *Commissioners v. Younger*, 29 Cal. 176; *Byrne v. Jansen*, 50 Cal. 627; *Alden v. Pryal*, 60 Cal. 215; *Champion v. Woods*, 79 Cal. 20; 12 Am. St. Rep. 126; *Hanscom v. Drullard*, 79 Cal. 237; *Harvey v. Dale*, 96 Cal. 161; *Waincott v. Occidental etc. Assn.*, 98 Cal. 257; *Daley v. Quick*, 99 Cal. 183; *Lion v. McClory*, 106 Cal. 623; *Montgomery v. Keppel*, 75 Cal. 130, 7 Am. St. Rep. 125; *Southern Development Co. v. Silva*, 125 U. S. 247; *Farrar v. Churchill*, 135 U. S. 609; *Andrus v. St. Louis etc. Ry. Co.*, 130 U. S. 643; *Farnsworth v. Duffner*, 142 U. S. 43; *Brown v. Leach*, 107 Mass. 368; *Parker v. Moulton*, 114 Mass. 99; 19 Am. Rep. 315; *Poland v. Brownell*, 131 Mass. 141; 41 Am. Rep. 215; *Deming v. Darling*, 148 Mass. 506; *Long*

v. Warren, 68 N. Y. 426; *Schumaker v. Mather*, 133 N. Y. 596; *Mosher v. Post*, 89 Wis. 602; *Farr v. Peterson*, 91 Wis. 182; *Lewis v. Brookdale Land Co.*, 124 Mo. 672.) It is only where the subject of the sale is not at hand that the buyer can rely upon the representations of the seller without investigation. It is otherwise when the property sold is at hand, and can be investigated. (*Chrysler v. Canaday*, 90 N. Y. 272; 43 Am. Rep. 166.) The finding placed in the conclusions of law that, "by reason of their neglect and failure to properly examine the property which they took in exchange for their property, and to investigate its value, equity will not grant relief to the plaintiffs," is a finding of fact which sustains the judgment, notwithstanding its position. (*Bath v. Valdez*, 70 Cal. 355; *Spargur v. Heard*, 90 Cal. 228; *Burton v. Burton*, 79 Cal. 490; *Foot v. Murphy*, 72 Cal. 105; *Millard v. Legion of Honor*, 81 Cal. 347.)

TEMPLE, J.—This action was brought to enforce a rescission of a contract for fraud. It is averred that Carrie C. Dow, wife of the other plaintiff, until August 1, 1895, and until conveyance to defendant Swain, owned as her separate property a ranch in Tulare county worth \$20,000. The Atlas Iron Works was a corporation with a capital stock of 100,000 shares, of the par value of \$10 per share, of which 83,882 shares had been issued. August 1, 1895, plaintiffs contracted with defendant Hovey, who professed to be the agent of defendant Swain, to exchange said farm for 22,220 shares of stock in said corporation. August 5th she conveyed the property to Swain and received the stock.

Plaintiffs were induced to make the exchange by certain fraudulent misrepresentations, which admittedly were quite material and important, and which were all averred and found to be false. It is also averred and found that the defendants were both interested in the exchange, although Hovey represented that he had no interest in the matter and no stock in the corporation, except just enough to authorize him to act as a director. Also, that plaintiffs knew nothing of the facts, save what they were told by Hovey. The representations were made with the intent to defraud and deceive; they were false, and both defendants knew that to be

so. It is found that plaintiffs believed the representations, and were induced by them to make the exchange which they would not otherwise have made. The representations were as to facts, and not mere matters of opinion.

Demand for a rescission and the necessary offer to return stock, et cetera, before the action was commenced, were all admitted.

But, while finding all other facts for plaintiffs, the court also found that there was no relation of trust or confidence between the parties, and plaintiffs were not fraudulently induced to forbear inquiry into the truth of the said representations, and "they might have ascertained their falsity by making the necessary investigations and employing the proper means to that end." And, so finding, rendered judgment for the defendants, and adds: "As conclusion of law from the foregoing facts the court finds: 1. That by reason of their neglect and failure to properly examine the property which they took in exchange for their property, and to investigate and ascertain its value, equity will not grant relief to the plaintiffs."

It is argued that this is a misplaced finding of a fact. I think not, though it may be doubted whether it can be called a conclusion of law. It is expressly a conclusion from the foregoing facts, and in its nature is not the statement of an ultimate fact, but the reason for a decision.

The property of the corporation consisted of a foundry on the Potrero, with machine shop attached, with tools and stock, and certain book accounts and bills receivable. The works were in operation. The finding states: "The plaintiffs had no experience in the business there carried on, nor in any similar business, and no knowledge in regard to the value of the said property and assets of the concern nor its shares of stock, and neither of them was skilled in books of account." The false representations as stated in the third finding were the following: "The said Hovey, for the purpose and with the intent to induce the making by the plaintiff of the contract mentioned in the complaint, and the execution of the said deed and transfer therein mentioned, stated and represented to the plaintiffs that the said Atlas Iron Works was perfectly solvent; that the net profits of its business for the

year 1894 was \$10,000; that there was outstanding accounts due to it which were good, sufficient to pay all its indebtedness; that it was in better condition than the statement of February 1, 1895 (set forth in the complaint) showed; that its credit was A1; that it could buy all the material it wanted on credit; that he knew more about its business than anyone else; that he had thoroughly investigated its affairs, and that said stock was worth ninety cents a share; that the open accounts shown in said statement of February 1, 1895, among the assets, were good; that he did not own any of said stock, except enough to qualify him as a director of the company; that said Swain had borrowed thirty-five or forty cents a share on the stock.

The statement of February 1, 1895, was shown to plaintiffs in connection with the representations, and is as follows:

Statement of the Atlas Iron Works.

February 1, 1895.

Assets.

Construction, Building, Hotel,

Stock and tools	\$68,742 22
Cash	883 92
Merchandise	5,016 00
Open Accounts	21,252 27

Total\$95,894.41

Liabilities.

Open Accounts	\$ 4,169 05
Note, J. F. Chapman	1,173 89
Anglo California Bank	2,412 50
Pacific Axle Co., note due Jan. 1896...	8,791 50

Total\$16,546.94

Assets over and above liabilities\$79,347.47

As stated, the court specifically finds each representation untrue. As to the statement of February 1, 1895, it was found that the property valued at \$68,742.22 was not worth to exceed \$25,000, and that more than \$8,000 of the open

accounts were worthless, and that the collections from bills receivable will not pay the indebtedness by \$4,357.35.

The eleventh finding is as follows: "The stock of the Atlas Iron Works has no market value. It was not bought or sold on the market. It was not worth intrinsically to exceed thirty cents a share. That amount per share might have been derived from a sale of all its property and plant as a going concern, the payment of its debts and the division of the surplus among the outstanding shares, provided a purchaser could be found. If it had been compelled, within any reasonable time, to sell its property and assets for what they would bring in cash, there would have been no surplus for the stockholders. The value of the stock could have been approximately ascertained only by a thorough investigation by experts of the values of its assets and property, and of its books and business."

Before closing the trade Hovey took plaintiffs to the foundry, where they met Swain, who was secretary of the corporation. The defendants then showed plaintiffs through the foundry, and they were "informed in a general way that they could have opportunity to examine the books of the company." At the same time Hovey told them that he "knew all about the affairs of the company and could give them any information that they wanted." Plaintiffs did not examine the books or employ anyone to do so, and did not discover the falsity "of any of the said statements or representations above found to have been made, nor did they gain any knowledge beyond the said representations." All these facts are from the findings, there being no bill of exceptions.

And this is the rule of law asserted by the judgment. Although the vendor and his agent had peculiar means of knowing the material facts, and knew that plaintiffs knew nothing of the property or of the business, or of bookkeeping; and although the value of the property could not have been ascertained without the employment of skilled accountants and expert appraisers; although plaintiffs relied wholly upon the false representations, and had no other knowledge, and no means of knowledge, except by the employing of experts to examine the books and property, and although even by that means the falsity of some quite material misrepresentations could not have been discovered (such as the value of the

open accounts), still, plaintiffs cannot recover, because there was no relation of trust and confidence between the parties, and they were not fraudulently induced to forbear inquiry, "and they might have ascertained their falsity by making the necessary investigations and employing the proper means to that end." The word "necessary" must mean such inquiries as would have proved successful. If the rule were applied to all cases of fraud, relief would always be denied where the relations are not confidential.

It is unnecessary to state that no case has been or can be found which comes anywhere near sustaining this proposition. The only rational explanation of the ruling which I can imagine is, that the court concluded that plaintiffs did investigate for themselves, and did not rely upon the representations, and, since they were not induced to forbear by the fault of the defendants, it was their own fault if their investigations were not sufficiently thorough.

The general rules upon the question as to when a party may or may not rely upon representations are stated in Pomeroy's Equity Jurisprudence, section 892. He cannot rely upon them: 1. When he investigates for himself; 2. When he is afforded the means of investigation and commences to make inquiries which, if efficiently prosecuted, would have resulted in proving the falsity of the representations; 3. When the representation is in regard to generalities, equally within the knowledge of the parties, or the knowledge is equally within the reach of both parties. "But when the representation is concerning facts of which the party making it has, or is supposed to have, knowledge, and the other party has no such advantage, and the circumstances are not those described in the first or second case, then it will be presumed that he relied on the statements; he is justified in doing so." This case is plainly within this last proposition, unless the plaintiffs, instead of relying upon the representations, did investigate for themselves. The parties were not on an equal footing as to knowledge. Defendants, as they represented, knew more about the matter than anybody else—the plaintiffs were entirely ignorant in regard to such property. The corporate stock, which was the subject of the trade, had no market value, but the false representations gave it an intrinsic value. This is not a case of patent

defects or where the property is at hand, and it would argue gross negligence on the part of the buyer to rely upon statements of the seller without opening his eyes to look. Under such circumstances there is no case which holds that the purchaser is bound to investigate for himself, and may not rely upon the representations, and that equity will not grant relief to him if he does and is defrauded.

The reason given by the court for its conclusion that defendants were entitled to judgment was as stated, but it found facts as follows: "The plaintiffs were deceived and misled by said false statements and representations, and were ignorant of their falsity, but believed them to be true, and they both acted and relied solely upon them as true, in making said contract and executing and delivering said deed and transfer, and were induced thereby to make said contract and execute said deed and transfer, and, but for said false statements and representatoinis, would not have entered into said contract or made said deed and transfer.

"The plaintiffs did not discover or know the falsity of said representations and statements, nor any of them, until more than two weeks after they had executed and delivered the said deed and transfer."

And further: "By reason of said statements and representations, and their reliance thereon, the plaintiffs have suffered damages in the loss of the real and personal property described in the complaint, and to the value and amount thereof."

The plaintiffs were not put upon inquiry by having their suspicions so aroused that it was negligence on their part not to inquire further, and it also appears that they did not in fact rely upon any examination made by themselves—if it can be held that they made any.

It is quite obvious that the plaintiffs in this case did not make an examination for themselves, or attempt to do so. Defendants knew that they were utterly incapable of so doing, except, as the court finds, by the employment of experts. Showing these inexperienced rustics through the foundry and machine shops was but in furtherance of the fraud, and when they were told "in a general way" that they could examine the books, Hovey also told them that he knew

all about it and could give them all the information they desired. To lead a blind man through the works would not have afforded an opportunity to examine for himself. These could learn no more except that there was in fact a foundry.

I do not subscribe to the idea that under all circumstances an actual examination by the buyer will shield the wrongdoer from an action for damages.

Every case must be judged for itself, and the circumstances which warrant or forbid relief cannot be scheduled. If the seller knows the facts, and the buyer is ignorant, and to the knowledge of the seller the buyer relies upon the representations, I see no reason why relief should not be granted, although an imperfect examination was made. It may have been imperfect because of the representations. Means were used to prevent the examination, and it would not be going far to say that the relation is made confidential by the mere making of the representation with the knowledge that it will be acted upon. (Civ. Code, sec. 2219.)

"It is now settled law that one who chooses to make positive assertions without warrant will not excuse himself by saying that the other party need not have relied upon them. He must show that his representations were not in fact relied upon. In the same spirit it is now understood that the defense of contributory negligence does not mean that the plaintiff is to be punished for his want of caution, but that an act or default of his own, and not the negligence of the defendant, was the approximate cause of his damage." (Webb's Pollack on Torts, 378, and see note where numerous authorities are cited.)

In Bishop on Noncontract Law, sec. 330, it is said: That plaintiff is too credulous is not generally a defense. "The test of the representation is its actual effect on the particular mind, whether it is a strong and circumspect mind, or one weak and too relying." (See, also, Bigelow on Frauds, 524.)

"Every contracting party has an absolute right to rely on the express statement of an existing fact, the truth of which is known to the opposite party and unknown to him, as the basis of a mutual agreement; and he is under no obligation to investigate and verify statements to the truth of which the other party to the contract, with full means of knowledge,

has deliberately pledged his faith." (*Mead v. Bunn*, 32 N. Y. 275.) To the same effect are *Eaton v. Winnie*, 20 Mich. 153, 4 Am. Rep. 377; *McBean v. Craddock*, 28 Mo. App. 380, and numerous cases there cited.

The effrontery of the defendants and their unbounded confidence in the guileless simplicity of the plaintiffs is shown by the fact that they told Mrs. Dow that she could verify the statement of February 1, 1895, which is set out above, by inquiring at the mercantile agencies. She did so inquire, and found only that the same statement had been submitted there by the Atlas Iron Works, of which Swain was secretary. This sufficiently shows the incapacity of plaintiffs, but ✓ hardly proves that they examined for themselves and did not rely upon the representations.

I have examined the numerous authorities cited by counsel for respondent, and do not think there is one which would help his case. He assumes, however, that his case is one in which the purchasers did not rely upon the representations, but made an examination for themselves. I cannot agree with that proposition.

The findings seem to cover the whole case, and every issue of fact is resolved in favor of plaintiffs. I see no reason for a new trial. The findings as they are entitle the plaintiffs to the relief demanded.

The cause is therefore remanded, with directions to set aside the judgment, and in lieu thereof to enter judgment for the plaintiffs, as demanded in the complaint.

McFarland, J., and Henshaw, J., concurred.

[L. A. No. 485. Department Two.—September 7, 1899.]

ANTHONY G. HUBBARD, Respondent, v. UNIVERSITY BANK OF LOS ANGELES et al., Appellants.

FORECLOSURE OF MORTGAGE—JOINDER OF PARTIES—ENDORSERS OF NOTE.—

In the action for the foreclosure of a mortgage securing the payment of a promissory note which was endorsed before delivery by third parties who waived demand and notice, the endorsers of the note may be properly joined as codefendants.

ID.—JUDGMENT FOR DEFICIENCY AGAINST ENDORSER.—In such action a judgment may be rendered and ordered docketed for the deficiency which may arise after sale of the mortgaged premises, against the endorsers as well as against the makers of the note.

ID.—ALLOWANCE OF ATTORNEY'S FEE—EXECUTION OF MORTGAGE BY CORPORATION—AUTHORITY FROM DIRECTORS—ADMISSIONS IN PLEADINGS.—Where the mortgage in suit expressly provided for the allowance of a reasonable attorney's fee, to be fixed by the court, the corporation defendant, in whose name the mortgage was executed, is bound by admissions in the pleadings that the corporation executed the mortgage, and that its execution was authorized by resolution of its directors; and it cannot claim that the resolution did not authorize the allowance of an attorney's fee.

APPEAL from a judgment of the Superior Court of Los Angeles County. W. H. Clark, Judge.

The facts are stated in the opinion of the court.

R. Dunnigan, H. L. Dunnigan, and Dunnigan & Dunnigan, for Appellants.

E. R. Annable, for Respondent.

HENSHAW, J.—The action was brought upon a promissory note secured by mortgage. The University Bank, as maker, executed both the note and mortgage to the plaintiff as payee and mortgagee. Other of the defendants indorsed the note at the time it was made and before its delivery as follows: "Demand of payment, notice of dishonor, protest, and notice of protest hereby waived." The mortgage provided for a reasonable attorney's fee to be fixed by the court, and declared that the fee fixed should be deemed a lien upon the mortgaged premises secured by the mortgage. The complaint was verified. It pleaded that a thousand dollars was a reasonable sum to be allowed as attorney's fees. The only issue upon this point was a denial that such an amount was a reasonable amount. The foreclosure was decreed, the property ordered sold, and a judgment for any deficiency docketed against the appellants, the makers and indorsers of the note. The indorsers contend that they were improperly joined as codefendants in the action. They were properly joined. (Civ. Code, sec. 2117; Code Civ. Proc., sec. 383; 3 Randolph

on Commercial Paper, sec. 1660; Wiltzie on Mortgage Foreclosure, sec. 208.)

It is next contended that no attorney's fee should have been allowed. Herein it is argued that the resolution of the corporation authorized the execution of the mortgage and mortgage note to plaintiff did not authorize the payment of an attorney's fee; but the complaint, which was verified, averred that plaintiff agreed with the bank "that if it would cause to be executed and delivered to him a certain indorsed note and collateral mortgage in manner and form as it subsequently did execute and deliver said instruments, as herein-after stated, that he would make such loan to it," et cetera. It is then averred that "the defendant corporation, in response to plaintiff's proposal, did then and there duly adopt and pass a certain resolution authorizing the execution of a mortgage to plaintiff, said mortgage to contain the covenants, terms and provisions set forth in the draft of mortgage proposed and submitted to this board by the said Anthony G. Hubbard," and further, "that the bank did, pursuant to the proposals and demands of the plaintiff made as aforesaid, execute and deliver unto him the mortgage set forth." There is no question but that the mortgage executed by the bank did provide for the payment of attorney's fees, and that the fee allowed by the court should be secured by the mortgage. The averments above quoted are sufficient to charge the corporation with the execution of this particular mortgage, and, as they are not denied, the defendants are bound by them.

We think the court correctly construed the collateral agreement, and that the judgment rendered was not in excess of the sum actually due.

The judgment appealed from is affirmed.

Temple, J., and McFarland, J., concurred.

[S. F. No. 1763. Department One.—September 8, 1899.]

NICOLA FERREA, Appellant, v. HIRAM TUBBS, Executor, et cetera, Respondents.

TENDER PENDING APPEAL FROM JUDGMENT—STOPPAGE OF INTEREST.—A tender by the defendant, to the plaintiff, pending an appeal by the plaintiff from a judgment in his favor, of the full amount of the judgment, with all costs, and interest to the date of the tender, if refused, stops interest from the date of the tender.

ID.—TENDER TO CLIENT PENDING SUIT—AUTHORITY OF ATTORNEY.—A tender pending suit is properly made to the opposite party personally, and need not be made to his attorney, whose authority to control the suit does not preclude such tender. It primarily rests with the client, and not with his attorney, to decide whether or not the amount tendered shall be accepted in full satisfaction of his claim for money due.

ID.—REFUSAL OF TENDER—RELEASE OF INTEREST.—The refusal by a plaintiff pending his appeal from a judgment of a valid tender made to him by the defendant, operates as a release by the plaintiff as judgment creditor of all interest which would otherwise have accrued thereon after the date of the tender.

ID.—CONDITIONAL TENDER—DEMAND FOR RECEIPT.—In this state, under section 1499 of the Civil Code, a debtor has a right to demand a written receipt from his creditor of any property delivered in performance of his obligation; and a valid tender of a sufficient amount may be properly conditioned upon a written receipt for the money tendered as payment in full of a judgment with interest and costs.

ID.—DEPOSIT OF MONEY TENDERED.—The money tendered need not be deposited in court, when it is not sought to extinguish the obligation, but merely to stop the running of interest.

ID.—INTEREST UPON JUDGMENT—STAY OF EXECUTION.—The stay of execution upon a judgment for the plaintiff pending an appeal therefrom by the plaintiff does not operate to suspend the running of interest, or preclude a tender by the defendant for the purpose of stopping interest thereon.

ID.—APPLICATION TO SUPREME COURT—JURISDICTION.—The respondent was not bound to make any application to the supreme court pending the appeal by the plaintiff for leave to make the tender. The supreme court took the case as made up in the trial court, and had no jurisdiction to examine into the merits of the tender.

ID.—REMITTITUR—PAYMENT OF MONEY TENDERED—DUTY OF SUPERIOR COURT.—Upon the going down of the *remittitur*, the defendant had the right to bring the money tendered into court, and it then became the duty of the superior court to inquire into the effect of the tender, and to determine the amount required to satisfy the judgment.

APPEAL from an order of the Superior Court of the City and County of San Francisco granting a motion of defendants to satisfy a judgment. J. C. B. Hebbard, Judge.

The facts are stated in the opinion of the court.

Sullivan & Sullivan, for Appellant.

The tender should have been made to the attorneys of the plaintiff, and not to plaintiff personally. (*Board of Commrs. v. Younger*, 29 Cal. 147; 87 Am. Dec. 164; *Mott v. Foster*, 45 Cal. 72; *Wylie v. Sierra Gold Co.*, 120 Cal. 485; *Nightingale v. Oregon Cent. R. R. Co.*, 2 Saw. 341; *Webb v. Dill*, 18 Abb. Pr. 265; *McConnell v. Brown*, 40 Ind. 384; *Bonnifield v. Thorp*, 71 Fed. Rep. 924.) The judgment of the superior court was suspended and devitalized by the appeal, and removed from the jurisdiction of the lower court. (Code Civ. Proc., secs. 946, 949; *In re Schedel*, 69 Cal. 241; *State Investment Co. v. Superior Court*, 101 Cal. 135, 150; *Ruggles v. Superior Court*, 103 Cal. 125-28; *Ex parte Queirolo*, 119 Cal. 635, 636; *People v. Frisbie*, 26 Cal. 135.) The tender or offer of performance was hampered by a condition which interfered with plaintiff's right of appeal, and was not valid for that reason. (Civ. Code, sec. 1494; *In re Baby*, 87 Cal. 200; 22 Am. St. Rep. 239; *People v. Burns*, 78 Cal. 645; 25 Am. & Eng. Ency. of Law, 912.) Plaintiffs were not then entitled to a receipt in full from plaintiff for the judgment appealed from by plaintiff, and the demand made for a receipt to which plaintiff was not then entitled invalidated the tender. (Civ. Code, sec. 1494; *Noyes v. Wyckoff*, 114 N. Y. 207; *Wood v. Hitchcock*, 20 Wend. 47-49; *Roosvelt v. Bullshead Bank*, 45 Barb. 579, 583; *Frost v. Yonkers Sav. Bank*, 70 N. Y. 558; 26 Am. Rep. 627; *Sanford v. Bulkley*, 30 Conn. 344, 349; *Cothran v. Scanlan*, 34 Ga. 556; 25 Am. & Eng. Ency. of Law, 912.) The supreme court had jurisdiction of the judgment, and of any modification thereof, on motion, and application should have been made in this court. (*Fox v. Hale etc. Min. Co.*, 122 Cal. 223.) The supreme court had power to modify the judgment, as to interest. (*Gautier v. English*, 29 Cal. 165; *Dent v. Holbrook*, 54 Cal. 146.)

F. W. Hall, and Hilborn & Hall, for Respondents.

The tender stopped interest on the judgment, though title to the money tendered was not transferred by deposit for plaintiff. (Civ. Code, sec. 1504.) The tender to plaintiff personally was proper. (Civ. Code, secs. 675, 1488; *Fuller v. Baker*, 48 Cal. 632.) The defendant had a right to insist upon a written receipt, on paying or tendering the amount of the judgment in full. (Code Civ. Proc., sec. 675; Civ. Code, secs. 1499, 2075.) The judgment existed, and drew interest pending the appeal, and defendants had the right to stop interest by a tender notwithstanding the stay of proceedings, the tender not being an act suspended by the appeal. (*Dulin v. Pacific Wood etc. Co.*, 98 Cal. 304; *Low v. Adams*, 6 Cal. 277; *Taylor v. Shew*, 39 Cal. 536; 2 Am. Rep. 478.) If the plaintiff by his voluntary act prosecuted his appeal from the judgment, rather than to receive the amount tendered, he could not claim interest, upon affirmance of the judgment. Interest is only allowed as damages for failure to pay money due, or for delay in its payment. (Civ. Code, sec. 1915; *White v. Lyons*, 42 Cal. 279; *London v. Taxing Dist.*, 104 U. S. 771; *Chicago v. Tebbetts*, 104 U. S. 120.)

GAROUTTE, J.—Plaintiff in an action for damages recovered a judgment of four thousand eight hundred dollars. He appealed from this judgment, and also from an order refusing his motion for a new trial. Pending the appeal to this court defendants tendered him the full amount of the judgment, with all costs, and interest to that date. This tender was refused. Subsequently upon appeal the judgment and order denying a new trial were affirmed. Upon the return of the *remittitur* to the superior court, defendants asked for an order that the judgment be satisfied conditionally, upon the payment into court of the amount of the tender; and at the same time again tendered to plaintiff the aforesaid amount, and paid the same into court. Whereupon an order was made satisfying the judgment. The present appeal is prosecuted from that order, the real question being: Did the tender made to plaintiff by defendants pending his appeal to this court stop the running of interest upon the judgment from which his appeal was taken?

We see no force in the contention that the tender should have been made to plaintiff's attorneys rather than to plain-

tiff himself. While it may be assumed that the attorney has sole control of his client's case, as far as any question of practice and procedure is concerned, yet there can be no question but that a tender of money pending the litigation may be made to the client. The statute expressly authorizes the judgment creditor to satisfy the judgment, and section 1488 declares that an offer of performance must be made to the creditor, or one authorized by him to receive the amount due. It primarily rests with the plaintiff, and not his attorneys, to decide whether or not an amount tendered should be accepted in full satisfaction of a claim for money due, and this tender was made to the proper party.

It is next claimed that the tender was conditional, and therefore of no force. The condition was that plaintiff deliver a receipt for said money "as payment in full for said judgment, with interest and costs." The offer is claimed to be violative of section 1494 of the Civil Code, which provides: "An offer of performance must be free from any conditions which the creditor is not bound on his part to perform." Whatever may be the law in other jurisdictions, especially in England, as to the effect upon the validity of a tender by the demand of a receipt from the creditor at the time, we are convinced that the true rule in this state is that a receipt may be demanded without jeopardizing the legality of the tender. Our code provides: "When a debtor is entitled to the performance of a condition precedent to, or concurrent with, performance on his part, he may make his offer to depend upon the due performance of such condition." (Civ. Code, sec. 1498.) "A debtor has a right to require from his creditor a written receipt for any property delivered in performance of his obligation." (Civ. Code, sec. 1499.) By virtue of section 1498, 1499, a debtor has a right to demand of the creditor a receipt. And by virtue of section 1494 the offer of performance need only be free from conditions which the creditor is not bound to perform. If the debtor tender a sufficient amount of money, he is entitled to a receipt in full, and may couple his tender with a demand for such receipt. Again, it was not necessary to deposit the money in court after tender made, in order to stop the running of interest. A deposit in court is only demanded when

is it desired to extinguish the original obligation. No claim of that kind is made by the debtor here.

Appellant's main contention seems to be based upon the following closely connected legal propositions advanced separately in his brief: "1. The filing of the three hundred dollar cost bond perfected the appeal, and operated as a *superseas* as to the judgment; 2. Pending the appeal the superior court was divested of jurisdiction for the enforcement or satisfaction of the judgment; 3. Pending the appeal neither party could enforce nor satisfy the judgment." These contentions seem to miss the mark to which they are directed. We are not concerned in the fact, even if it be true, that pending the appeal neither party could enforce or satisfy the judgment; nor the further fact that pending the appeal the superior court had no jurisdiction to order the judgment satisfied. These matters are not material here. By the tender made to plaintiff no attempt was made to secure relief by judicial action. It was a matter entirely outside of the courts. No court was asked to do anything. If the right of tender be denied here, it might with equal propriety be claimed that these two parties, pending the appeal, could not contract regarding the subject matter of this litigation, either with themselves or with others. By the tender made it was not sought to invoke the jurisdiction of the superior court in any way, nor to trespass upon the right of this court to hear the appeal. If the tender has been accepted and the receipt in full given, the transaction would have been perfectly valid, and inevitably would have resulted in an end to the litigation. Appellant concedes all this when he says an acceptance of the tender would have resulted in a dismissal of his appeal. It seems to follow irresistibly that defendant had the legal right to make the tender. If he had the legal right to make it, certainly the creditor had the legal right to accept it; and, if it was a legal tender, it carried with it all the incidents of a valid and legal tender.

The appeal stayed any execution of the judgment. Especially is this plain, for plaintiff is appealing from a money judgment rendered in his favor. But appellant's position in this regard is not entirely clear to us. He says the judgment of the trial court was devitalized by the appeal and revitalized

by its affirmance in this court. He also seems, inferentially at least, to claim that, the judgment being devitalized at the date of the tender, no tender could be made. In other words, the claim at that time had assumed its original condition, that of an unliquidated claim for damages. This is his position, or it is that, when the tender was made, the judgment, being devitalized by reason of the appeal, was drawing no interest, and therefore the tender could not have the effect of stopping the running of interest. This court has had occasion many times, especially in recent days, to define the status of a judgment pending appeal; but the position now taken by appellant presents unplowed ground. It is somewhat original. We do not understand that an appeal stops the running of interest upon the judgment. Certainly, this court has never so decided. However inanimate a judgment may be pending appeal, we believe it still has life enough to draw to itself interest. This court may have said that such a judgment was sleeping, but it never has gone so far as to declare it dead. If defendants had appealed from this judgment, instead of plaintiff, and upon appeal the judgment had been affirmed, certainly it would have drawn interest pending the appeal. Then why not in the present case? In justice and equity defendants should have the right to stop the running of interest upon it. By the affirmance of the judgment in this court it was declared that plaintiff should not have appealed the case. It was further declared that defendants' tender in effect was sufficient in amount to cover all plaintiff's just claims, and therefore should have been accepted when made. Plaintiff could refuse to accept the tender, and prosecute his appeal, but he thereby assumed the risk of losing the use of this money pending the appeal in case of an affirmance of the judgment. We are perfectly satisfied that this judgment was not so devitalized by the appeal, but that it still remained such a liquidated demand that a tender could be made by the debtor which would stop the running of interest.

It is claimed that, if defendants desired to secure any benefit from the tender made, they should have applied for leave to this court while the appeal was here pending. But this court, upon appeal, only reviewed the action of the trial

court. It took the case as made by the trial court. It could not examine into the merits of this tender. Upon the going down of the *remittitur* it was clearly the right of defendants to bring their money into court and ask that the judgment be satisfied. Upon such action and request by them, it was the duty of the trial court to determine the amount of money necessary to satisfy the judgment. If there were any credits to be made, then and there was the time for their allowance, and in effect the refusal of the tender here involved operated as a release by the judgment creditor of all interest which would otherwise have accrued upon the judgment after the date of the tender.

The remaining questions raised by appellant in his brief have been considered. We find nothing there which demands extended consideration. They appear to be without substantial merits.

For the foregoing reasons the judgment and order are affirmed.

Van Dyke, J., and Harrison, J., concurred.

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ACCOUNT. See Corporations, 13-17.

ACCOUNTING. See Estates of Deceased Persons, 26.

ACKNOWLEDGMENT.

1. **MINISTERIAL ACT.**—The act of a notary in taking an acknowledgment of an instrument is ministerial, and not judicial, in its nature. (Bank of Woodland v. Oberhaus, 320.)
2. **AGENCY OF NOTARY—INTEREST IN TRANSACTION.**—Notaries public are not disqualified by reason merely of being agents of the parties to the instruments to be acknowledged, if they are not pecuniarily interested in the transaction. (Id.)
3. **MORTGAGE TO BANK—ACKNOWLEDGMENT BY CASHIER.**—The acknowledgment of a mortgage to a bank before a notary who was cashier of the bank is not for that reason alone invalid, if it appears that the cashier had no interest in the bank or in its property, but was a mere salaried officer, and that his position as notary was distinct from his position as cashier, and that the fees received by him as notary belonged to him individually, and not to the bank. (Id.)

ADVERSE POSSESSION.

1. **TENANCY IN COMMON—HOSTILE INTENT.**—In order to establish adverse possession by a tenant in common against his cotenants, clear and unequivocal proof is required of hostile intent on his part manifested to oust the cotenants. (Brown v. McKay, 291.)
2. **PRESUMPTIONS—FATHER AND SONS AS COTENANTS.**—All presumptions of law, of fact, and of good morals are against an adverse holding by a father who became tenant in common with his sons as heirs of the deceased wife and mother, and who recognized their title by becoming guardian of their estate and maintained friendly relations with them until death, and devised his interest to them in one parcel of the inherited realty. (Id.)
3. **UNSETTLED GUARDIANSHIP—LEASE—INSUFFICIENT PROOF OF ADVERSE HOLDING.**—The mere facts, in such case, that the guardianship was never settled, and that the father executed a lease to one of the sons after he became of age, of another parcel of the inherited realty, which does not appear to have been devised, by the father, are in-

ADVERSE POSSESSION (Continued).

sufficient to evince a hostile intent as to such parcel or to establish an adverse holding thereof by the father as against the sons. (Id.) See Dedication, 8; Easement.

AGENCY.

HUSBAND AND WIFE—UNAUTHORIZED LOAN—RATIFICATION—FINDINGS AGAINST EVIDENCE—DECISION UPON FORMER APPEAL.—The findings in this case as to the ratification by a wife of the unauthorized act of her husband in borrowing money, which was obtained upon a note and mortgage executed by him without authority as her attorney-in-fact, held not sustained by evidence not differing in legal effect from that appearing upon a former appeal (104 Cal. 672), which was held insufficient to establish a ratification of the loan, for want of knowledge by the wife of her rights, and for want of reception by her of the benefit of the loan, except as to part thereof paid to release a mortgage upon her property. (Brown v. Rouse, 645.)

See Acknowledgment, 2; Attorney at Law; Broker; Contract, 6; Corporations, 3.

ALIMONY.

1. **SHERIFF'S SALE FOR ALIMONY—ACTION TO SET ASIDE PROCEEDINGS—CLOUD UPON TITLE—CROSS-COMPLAINT TO QUIET TITLE—JOINDER OF CAUSES.**—In an action against the purchaser of the husband's title at a sheriff's sale under execution for temporary alimony, and against the wife, to set aside as void the proceedings to enforce the alimony, and to remove the title claimed by the purchaser as an alleged cloud upon plaintiff's title, the purchaser, having been placed in possession under the sheriff's deed, may maintain a cross-complaint to quiet his title as against a void and fraudulent deed to the plaintiff from the husband's grantor; and such cross-complaint is not demurrable for misjoinder of causes, in improperly uniting the cause of action stated therein with that stated in the complaint. (Stephenson v. Deuel, 656.)
2. **TITLE OF HUSBAND—DELIVERY OF UNRECORDED DEED TO AGENT—VOID RECORDED DEED TO PLAINTIFF—FRAUD OF HUSBAND.**—The delivery of an unrecorded deed to an agent of the husband for him as grantee, passed title to him, and left no title remaining in the grantor; and a subsequent deed, executed at the husband's request, from the same grantor to the daughter of the husband, the plaintiff in the action, without consideration, and which was executed and recorded for the purpose of preventing the property from being reached by the wife for alimony in the divorce suit, or by other creditors of the husband, was void, and passed no title to the plaintiff, irrespective of the question of fraud. (Id.)

ALIMONY (Continued).

3. **VALIDITY OF SALE FOR ALIMONY—SERVICE OF ORDER FOR COUNSEL FEES—COLLATERAL ATTACK.**—The validity of the sheriff's sale and deed of the husband's property under an execution for temporary alimony, including counsel fees, cannot be collaterally attacked by a plaintiff who is found to have had no title, on the ground that the order for counsel fees was served upon the attorney for the husband and not upon the husband personally. It is immaterial to the plaintiff whether the order was properly served or not. (Id.)
4. **EVIDENCE—ISSUE OF FRAUD—FRAUDULENT INTENT OF HUSBAND.**—Where the issue as to the fraudulent purpose of the conveyance made to the plaintiff at request of the husband, was raised by the pleadings, evidence as to the fraudulent intent of the husband is material upon that issue. (Id.)

APPEAL.

1. **DISMISSAL—UNDERTAKING ON NEW TRIAL ORDER—CONSIDERATION—ALTERATION.**—An undertaking on appeal from an order denying a new trial before it is entered is without consideration; and the subsequent interlineation of the date of the order in such undertaking is an alteration which discharges the sureties from all obligation thereupon, and such appeal must be dismissed. (Clarke v. Mohr, 540.)
2. **APPEAL FROM JUDGMENT—SUFFICIENCY OF UNDERTAKING—SURPLUSAGE.**—The undertaking upon appeal from the judgment is distinct from that upon appeal from the order denying a new trial, though both may be included in the same instrument, and, where such undertaking is supported by a sufficient consideration, and was filed in proper time, the invalidity of the undertaking upon appeal from the new trial order or a material alteration therein does not affect the appeal from the judgment, but the language in reference to the new trial order may be regarded as surplusage. (Id.)
3. **SERVICE OF NOTICE OF APPEAL.**—The notice of appeal from a judgment is not required to be served upon defendants who do not appear from the record to have been served with summons, or to have appeared in the action. (Id.)
4. **DISMISSAL—GROUNDS OF MOTION—WANT OF SUFFICIENT UNDERTAKING—WAIVER.**—An appeal cannot be dismissed for want of a sufficient undertaking where it is not made a ground of the motion of a respondent, as the respondent may have waived the giving of the undertaking. (Id.)
5. **DISMISSAL—ORDER REFUSING TO VACATE DEFAULT JUDGMENT.**—An appeal from an order refusing to vacate a judgment by default, being from an order made after final judgment, must be taken within sixty days from the date of the order, and if not so taken must be dismissed. (Doyle v. Republic Life Ins. Co., 15.)

APPEAL (Continued).

6. **NONAPPEALABLE ORDER—DENIAL OF NEW TRIAL OF MOTION.**—It is not proper practice to move for a new trial of a motion to vacate a judgment; and the order refusing to vacate the judgment being appealable, a subsequent order refusing to vacate it, or denying a motion for a new trial thereof, is not appealable, and an appeal therefrom must be dismissed. (Id.)
7. **ORDER DENYING NEW TRIAL—STAY OF EXECUTION—CASE AFFIRMED.**—Upon an appeal from an order denying a new trial in an action for the recovery of money, the reversal of the order would necessarily set aside the judgment; and the giving of a bond in double the amount of the judgment operates as a stay of execution pending such appeal. *Fulton v. Hanna*, 40 Cal. 278, affirmed. (*Holland v. McDade*, 353.)
8. **APPEAL FROM NEW TRIAL ORDER—UNDERTAKING TO STAY EXECUTION—SUPERSEDEAS.**—An undertaking in double the amount of a judgment for the recovery of money is sufficient to stay execution upon appeal from an order denying a new trial, though there is no appeal from the judgment; and a writ of supersedeas will issue from this court to prevent the plaintiff from enforcing the judgment pending such appeal. (*Baldwin v. Superior Court*, 584.)
9. **JUDGMENT UNSUPPORTED BY FINDINGS—MOTION—CUMULATIVE REMEDY—REVERSAL.**—The remedy by motion in the superior court to set aside and vacate a judgment unsupported by the findings, and to enter another judgment in accordance therewith, provided for in the new sections 663 and 663½ of the Code of Civil Procedure, is merely cumulative; and was not designed to supersede the remedy by appeal provided in section 963 of that Code. Upon such appeal, the judgment may be reversed, and the court below directed to enter the judgment required by the findings. (*Patch v. Miller*, 240.)
10. **FINDINGS AND JUDGMENT TOO BROAD—REVERSAL.**—Upon appeal, where the findings and judgment appear to be broader than the facts warrant, and they apparently cast a cloud on rights clearly belonging to the appellant, the judgment must be reversed. (*Mayberry v. Alhambra Addition Water Co.*, 444.)
11. **ARGUMENT—POINTS NOT URGED IN BRIEF.**—Where the appellant does not point out in his brief any particular issue or issues upon which the court omitted to find or what particular finding or findings were unsupported by evidence, and the particulars in which they were unsupported, it is not the duty of the appellate court to investigate those questions. (*Kyle v. Craig*, 107.)

See Costs; Criminal Law, 32, 33; Elections 4; Estates of Deceased Persons, 25, 34; Insolvency 14; Instructions, 1; Judgment, 5; Mechanic's Lien, 12; New Trial, 17, 20, 21, 23, 26; Pleadings, 8, 14, 15; Practice, 8, 9; Tender, 1-8.

APPEARANCE. See *Insolvency*, 1-3; *Practice*, 1-5.

ARBITRATION. See *Mutual Benefit Association*, 2-4.

ASSAULT. See *Criminal Law*, 1-3.

ASSIGNMENT. See *Corporation*, 3; *Mechanic's Liens*, 2-6.

ATTACHMENT. See *Pledge*.

ATTORNEY AT LAW.

1. **ATTORNEY AND CLIENT—AUTHORITY OF ATTORNEY TO EMPLOY ASSISTANT COUNSEL.**—An attorney-at-law has no general authority, by virtue of his retainer, to employ counsel or assistants at the expense of his client, without the client's previous authority or consent. (*Porter v. Elizalde*, 204.)
2. **UNDERSTANDING OF ASSISTANT—DECLARATIONS OF ATTORNEY.**—The liability of a client to compensate the assistant employed by his attorney cannot be established by the evidence of the assistant that it was his understanding that the attorney represented his client; nor can authority from the client, not in fact possessed by the attorney, be established by the declarations of the attorney. (*Id.*)
3. **ACCEPTANCE OF SERVICES—IMPLIED OBLIGATION—EXCEPTION TO RULE—AGREEMENT OF ATTORNEYS TO PAY EXPENSES.**—The general rule that the acceptance of services of another without objection implies an obligation to pay their reasonable value, is not uniform or absolute, but its application depends upon the circumstances of the case; and it does not apply in case of the mere acceptance of the services of assistant counsel, employed without the previous authority or consent of the client, by attorneys with whom the client has an agreement for compensation, covering the whole cause, and the payment of all the expenses of the litigation by them. (*Id.*)
4. **STATEMENT OF ASSISTANT COUNSEL IN ARGUMENT TO JURY—ESTOPPEL.**—A statement made by the assistant counsel in the argument to the jury, in support of the contest of a will, that the contestant would pay all the attorneys' fees in the case, did not call for the expression of any dissent, and could not create an estoppel by silence of the contestant, to dispute the obligation to pay the fees of the assistant counsel. (*Id.*)

See *Contract*, 1-3; *Estates of Deceased Persons*, 19, 20.

BANKS.

1. **LIQUIDATION UNDER ADVICE OF BANK COMMISSIONERS—CONTROL OF OFFICERS—ACTION BY DEPOSITOR.**—The closing of the doors of a bank, and the liquidation of its affairs under the control of its officers by the advice of the bank commissioners, in the absence of any proceedings taken under the banking act, is no defense to an action

BANKS (Continued).

by a depositor, who has been wholly neglected in the distribution of its assets, to recover the amount of his deposit. (*Lanz v. Fresno Loan and Savings Bank*, 456.)

2. **STOPPAGE OF PAYMENT—RIGHT OF ACTION—BY-LAW AS TO NOTICE—CASE FOLLOWED.**—The stoppage of payment by the bank gave a right of action to the plaintiff for the recovery of his deposit, without regard to compliance on his part with a by-law requiring notice to be given to the bank of the intended withdrawal of moneys deposited. *Mitchell v. Beckman*, 64 Cal. 117; approved and followed. (Id.)

See Acknowledgements, 3; Corporations, 13, 14; Guaranty, 5-12; Negotiable Instruments, 3; Payments.

BONA FIDE PURCHASER. See Fraud, 6, 8.

BONDS. See Corporation, 1, 2; Insolvency, 4-6; Municipal Corporations, 9-11.

BOUNDARIES.

1. **ACTION TO QUIET TITLE—BOUNDARY BETWEEN SECTIONS—FORMER JUDGMENT IN EJECTMENT.**—In an action to quiet title brought by a patentee of a quarter-section of land against a patentee of adjoining land in another section, involving the location of the boundary line of the government survey between the sections, a former judgment in an action of ejectment brought by the defendant against the plaintiff, settling the location of the same boundary line in favor of the defendant, is admissible against the plaintiff as a former adjudication of the subject matter, though at the time of the trial and judgment the plaintiff was not a patentee of the quarter-section, but held a pre-emption receipt therefor. (*Graves v. Hebron*, 400.)
2. **EFFECT OF PRE-EMPTION RECEIPT—BOUNDARIES NOT AFFECTED BY PATENT.**—One holding a quarter-section of surveyed government land, under a final pre-emption receipt entitling him to a patent therefor, acquires no new or greater right by his patent describing the same land described in the receipt so far as the boundaries of his land are concerned. His final receipt is *prima facie* evidence of ownership, and is a "certificate of purchase," within the meaning of section 1925 of the Code of Civil Procedure. (Id.)
3. **CERTAINTY OF FORMER JUDGMENT—EXTRINSIC EVIDENCE.**—In order to the operation of the former judgment as an estoppel, it must appear either upon the face of the record or be shown by extrinsic evidence that the precise question involved was raised and determined in the former action; and where there is uncertainty in the record of the former action of ejectment, extrinsic evidence is admissible to show that the boundary lines involved in the present action were in fact fixed and determined in the former action. (Id.)

See Public Lands, 3; Survey.

BROKER.

1. **COMPENSATION OF BROKER—EXCHANGE OF LANDS—BRINGING PARTIES TOGETHER—DOUBLE EMPLOYMENT.**—A broker will not be allowed to act as agent of both parties, to a contract for the sale and purchase of real estate, and an agreement for compensation from both of them will not be recognized by the courts; but this rule has no application where the broker does not act as an agent, or represent conflicting interests, but acts merely as a middleman to bring the parties to an exchange of lands together, and has nothing whatever to do with the trade between them. In such case, there is nothing in the relation of the parties to render the broker obnoxious to the charge of double employment; and he may receive compensation from both of the parties, if both agree to pay him. (*Clark v. Allen*, 276.)
2. **QUESTION OF FACT—CONVICTING EVIDENCE—ORDER GRANTING NEW TRIAL.**—The question whether the broker was merely a middleman, or was an agent of both parties, is one of fact to be determined by the trial court; and where there is conflicting evidence, from which the court might find either way, an order granting a new trial after rendering judgment in favor of the claim of the broker for compensation from one party, after having received compensation from the other party, if the new trial appears to have been granted for insufficiency of the evidence, will not be disturbed upon appeal. (*Id.*)
3. **PLEADING—CONTRACT TO MAKE A "DEAL"—PROCUREMENT OF PURCHASER—VARIANCE.**—A complaint alleging that under a contract with the defendant to make a "deal" for him respecting a certain piece of property, the plaintiffs procured a purchaser able and willing to purchase the land, is not at material variance with proof showing an exchange of lands, rather than a purchase, especially where the evidence of the exchange was received without objection. (*Id.*)

BURGLARY. See Criminal Law, 5, 6.

CLAIM AND DELIVERY.

1. **INSUFFICIENT COMPLAINT—PAST OWNERSHIP.**—A complaint in an action of claim and delivery, which merely avers the past ownership by the plaintiff of the personal property claimed, on the day of the seizure thereof by the defendant, and a demand of possession on that day, and does not aver any continued or present ownership or right of possession of the plaintiff, is not aided by an averment that defendant "still unlawfully withholds and detains said goods and chattels," and is insufficient to sustain a cause of action, or to support a judgment for the plaintiff. (*Bane v. Peerman*, 220.)
2. **OWNERSHIP AT COMMENCEMENT OF ACTION—FINDINGS OUTSIDE OF ISSUES.**—Such complaint cannot be supported or cured by findings outside of the issues, setting forth the ownership and right of pos-

CLAIM AND DELIVERY (Continued).

session of the plaintiff at the commencement of the action. Findings of fact must have a basis in the pleadings and be within the issues and can never cure the absence of an essential allegation. (Id.)

COMMISSIONER OF PUBLIC WORKS. See Office and Officers, 6, 7.

COMMUNITY PROPERTY.

1. **ACTION TO ENFORCE TRUST—AMENDMENT TO COMPLAINT—CHANGE OF ACTION—TRANSFER OF COMMUNITY PROPERTY BY WIFE—STATUTE OF LIMITATIONS.**—A complaint by a husband and child to enforce a trust against his wife, and her grantees, based upon the theory that she took the legal title as trustee for the benefit of the husband, wife and child, in equal shares, and conveyed it in violation of the trust, and that her grantee and his successor were not innocent purchasers, cannot be amended so as to change the cause of action by averring that the property held in the name of the wife was community property, of which she could not transfer the title, if such new cause of action was barred by the statute of limitations at the time of the proposed amendment. (Peiser v. Griffin, 9.)
2. **LIMITATION OF PAST CAUSE OF ACTION—VALID AMENDMENT OF CODE.** The amendment of March 3, 1893, to section 164 of the Civil Code, providing that where married women conveyed real property acquired prior to May 19, 1889, the husband shall be barred from commencing any action to show that said real property was community property from and after July 1, 1894, is a valid statute of limitations, fixing the time within which an action to avoid such a past conveyance by the wife must be brought. (Id.)
3. **AMENDMENT AFTER BAR OF ACTION—CONSTITUTIONAL LAW.**—If the statute of limitations has barred the right to commence an action to set aside a conveyance, the title of the property is regarded as vested in the possessor, irrespective of the original right, and no subsequent amendment or repeal of the limitation can constitutionally have a retroactive effect so as to disturb the title. (Id.)
4. **FINDINGS—PAYMENT BY HUSBAND—TRUST.**—A finding in the action to enforce the trust that the husband paid for the property held in the wife's name is not a finding that the property was community property, and does not warrant a judgment for the husband if the court finds that the wife did not hold the property in trust. (Id.)
5. **FAILURE OF ACTION—OMISSION TO FIND—TITLE OF INTERVENOR.**—Where, under the findings made, the judgment properly followed that the plaintiffs take nothing by their action, an omission to find determinately as to the title of an intervenor, who claimed to be a *bona fide* purchaser for value from the grantee of the wife, is immaterial, and cannot work an injury to the plaintiffs. (Id.)

CONSTITUTIONAL LAW. See Community Property, 3; Estates of Deceased Persons, 19; Municipal Corporations, 1; Office and Officers, 1-4, 7.

CONTEMPT.

1. **HABEAS CORPUS—BURDEN OF PROOF—CONTEMPT PROCEEDINGS—SHOWING FOR CITATION.**—Upon *habeas corpus*, the burden is upon the petitioner to show that a restraint which is apparently legal is not so; and if a commitment for contempt states facts sufficient to authorize a citation to the defendant, and there is no proof upon the subject, he cannot be released upon *habeas corpus* upon the ground that there was not a sufficient showing in the superior court to authorize the issuance of the citation. (In re Clarke, 388.)
2. **ALLEGED WANT OF JURISDICTION—CONSTRUCTION AGAINST PETITIONER.**—The allegations of a petition for a writ of *habeas corpus* to review proceedings for contempt, for an alleged want of jurisdiction over the proceedings in which the contempt was adjudged, are to be taken most strongly against the pleader. (Id.)
See Insolvency, 9, 10.

CONTRACT.

1. **VALIDITY—INFLUENCING PATENTS FROM SECRETARY OF INTERIOR.**—A contract by a person having timber-land entries, for the services of an attorney to influence the official action of the secretary of the interior favorably to the issuance of patents upon such entries, without any stipulation for the use of improper means or methods, and to pay for such services a percentage of the value of the timberlands, contingent upon success, is not void as against good morals or public policy. (Bergen v. Frisbie, 168.)
2. **CONTINGENT FEE—SECURING FAVORABLE DECISION.**—The contingent character of the fee fixed by the contract does not affect its validity; nor does the fact that the attorneys were retained to secure a favorable decision of the matters pending before the secretary of the interior taint the contract. (Id.)
3. **MEANS AND MANNER OF EMPLOYMENT—PRESUMPTION.**—The means and manner of the employment are the factors which determine the validity or invalidity of the contract; and in the absence of any showing that the means and methods to be used, or which were used, by the attorneys, were improper, it will be presumed that the contract is valid and enforceable. (Id.)
4. **ASSUMPSIT—SALE OF RAISINS UPON COMMISSION—PLEADING—ELECTION OF COUNTS.**—In an action to recover the value of raisins delivered to the defendants as commission agents, in which the first count of the complaint alleges delivery of the raisins to the defendants under an express agreement to make returns at a fixed price, the second count is in *quantum valebat*, and the third count

CONTRACT (Continued).

alleges an agreement to sell and deliver the raisins for a fixed price, the plaintiff cannot be compelled to elect between the counts. (*Estrella Vineyard Company v. Butler*, 232.)

5. **AGREEMENT FOR FIXED RETURN—CONFLICTING EVIDENCE—SUPPORT OF VERDICT.**—It is sufficient to support a verdict in favor of the plaintiff, as to the agreement alleged in the complaint, that plaintiff was to receive a fixed return for the raisins delivered, that the testimony for the plaintiff tends to sustain the allegation notwithstanding conflicting evidence to the contrary. (*Id.*)
6. **EVIDENCE—WRITTEN CONTRACT BY AGENT IN HIS OWN NAME—PROOF OF AUTHORITY OR KNOWLEDGE REQUIRED.**—A written contract with the defendants for the delivery of raisins signed by one who was an agent for the plaintiff, in his own name without any designation of agency, in the contract or in the signature, the authority for the execution of which was not proved, but disproved, is not admissible in evidence against the plaintiff, without such proof or without showing or offering to show that the plaintiff delivered the raisins thereunder with actual or implied knowledge of its existence. It is not enough to show that defendants on their part received the raisins under such contract. (*Id.*)
7. **QUALITY OF RAISINS—MARKET VALUE.**—Where the contract proved by the plaintiff called for the delivery of raisins of good quality in a particular market, without specifying the place where they were to be sold, evidence is admissible to show the quality of the raisins delivered, and their market value in that market. (*Id.*)
8. **SUBSCRIPTION FOR ENTERTAINMENT OF DELEGATES—CONSIDERATION—OBLIGATIONS INCURRED AT SUBSCRIBERS' REQUEST.**—Under a subscription to a fund to be paid to a committee of a Parlor of Native Sons toward the expense of entertaining delegates to a meeting of the Grand Parlor, the request of subscribers, upon demand of payment, that the committee should regard their subscription as cash, and proceed with their arrangements, and the action of the committee in incurring obligations on the faith of the request, was a sufficient consideration to fix the liability of the subscribers. (*Lasar v. Johnson*, 549.)
9. **TIME OF REQUEST.**—It is not necessary that such request should be made at the time of the subscription. (*Id.*)
10. **SUBSCRIPTION BY HOTELKEEPERS—COMPLIANCE WITH CONDITIONS.**—A subscription by hotelkeepers under an agreement with the committee that either a ball or a banquet should be given to the delegates at their hotel, and, in case neither was given, the subscription should be reduced one-half, is converted by such agreement into a contract, and the giving of a ball thereat in compliance with the condition of the agreement is a good consideration for the promise to pay the full amount of the subscription; and no question can be raised as to any reduction of the liability. (*Id.*)

CONTRACT (Continued).

11. **SUBSCRIPTION FOR "ENTERTAINMENT" OF DELEGATES—CONSTRUCTION.**
A subscription for the entertainment of a large number of strangers coming as delegates to the meeting of an organized body is not to be construed as limiting the entertainment to board or to the ordinary necessities of life, and all reasonable expenditures made and liabilities incurred in connection with the entertainment of such a body, including the expenses of a ball and banquet given for their enjoyment, are fairly within the meaning and intent of the subscription. (Id.)
12. **ACTION BY MEMBERS OF COMMITTEE—PARTIES—TRUSTEES OF EXPRESS TRUST—PLEADING—DEFECTIVE TITLE TO COMPLAINT.**—In an action upon a subscription payable "to the subscription committee of Los Osos Parlor," brought by the individuals constituting such committee, if the body of the complaint shows that they constituted and acted as such committee, and were the trustees of an express trust, the Parlor which was the beneficiary of the trust need not be joined as a party; and a defect in the title in not showing the trust relation of the plaintiffs cannot be objected to otherwise than by special demurrer. (Id.)
13. **DEFENSE—PAYMENT OF EXPENSES BY COMMITTEE—BORROWED MONEY.**
It is no defense to such action that the expenses of the entertainment of the delegates were paid by the committee, where it appears that a deficiency greater than the amount of the subscription sued upon was met by borrowing the amount from one of the funds of the Parlor, not intended to be used for such entertainment. (Id.)

See Corporation, 7, 9; Municipal Corporations, 5-8; Mutual Benefit Association; Pleadings, 5-7, 12; Vendor and Vendee; Water and Water Rights, 1-6.

CONVERSIONS. See Findings, 1, 3; Warehouseman, 2.

CORPORATIONS.

1. **STREET RAILROAD CORPORATIONS—CREATION OF BONDED INDEBTEDNESS—LIABILITY OF STOCKHOLDERS.**—Bonds issued by a street railroad corporation in part payment for the construction of its railroad, are for the creation of a bonded indebtedness within the provision of section 359 of the Civil Code, requiring the creation of the bonded indebtedness of any corporation to be approved by the vote of two-thirds of the entire capital stock; and in default of such approval no liability is created upon such bonds against the stockholders. (Boyd v. Heron, 453.)
2. **CONSTRUCTION OF CODE.**—Section 456 of the Civil Code permitting railroad corporations to issue bonds in payment of any debts or contracts for constructing or completing their road is to be construed in connection with the general provisions of section 359 of the same code, requiring all corporations to give the stockholders a voice in saying whether or not a bonded indebtedness shall be created or increased. (Id.)

CORPORATIONS (Continued).

3. **FOREIGN CORPORATION—POWER OF LOCAL MANAGER—ASSIGNMENT OF CHECK FOR COLLECTION.**—The power of a local manager of a foreign corporation to sell chattels and receive the price, with a special direction from the corporation to collect a dishonored check given to the corporation, upon a sale of goods by the local manager, does not carry with it the power to assign such check to another person for collection against the drawer of the check. And the person to whom such manager assumes to assign the check cannot maintain an action thereon in virtue of such assignment. (*Rigby v. Lowe*, 613.)
4. **PARTNERSHIP—INCORPORATION OF FIRM—ACTION FOR GOODS SOLD AND DELIVERED—NOTICE.**—A corporation formed by members of a partnership firm, which took its assets, and continued to pay its debts, and to conduct the business as formerly, using its books, and continuing and extending the various accounts therein without break, is liable in an action for goods sold and delivered in the name of the firm by a former customer, who had no knowledge or notice of the incorporation until shortly before the commencement of the action, where it appears that the goods and bills therefor were received by the corporation, and the amounts thereof entered upon the books by it, and payments thereupon made by it without objection. (*Reid v. F. W. Kreling's Sons' Company*, 117.)
5. **DEFENSE—ESTOPPEL OF CORPORATION.**—The corporation, under the circumstances, is estopped from setting up a defense to such action, founded upon the change made from a copartnership to a corporation. (*Id.*)
6. **USE OF GOODS BY INDIVIDUALS.**—The fact that a small part of the goods sold were used by some of the individual members of the original firm in improving certain real property is immaterial, the goods having been ordered and sold and entered upon the books of both parties in the usual manner. (*Id.*)
7. **MINING CORPORATION—ACTION BY STOCKHOLDERS—FRAUDULENT MILLING OF ORE—BREACH OF CONTRACT—INSUFFICIENT COMPLAINT.** In an action by a stockholder of a mining corporation, for an accounting of ores claimed to have been fraudulently milled under a contract with a milling company, which provided that the ores "shall be worked in the usual and ordinary manner of working like ores, and returns therefrom shall not be less than seventy per cent of the pulp assay," a complaint alleging that seven hundred and thirty-four thousand tons of ore were milled under the contract and that said ores were milled in a very superficial and imperfect manner, and that less than seventy per cent was returned by the milling company to the mining company for more than forty-one thousand two hundred and seventy-five tons of ore, without stating how much less, or that the percentage was of the pulp assay, or when such tons of ore were milled, is not sufficient to support a judgment for the plaintiff. (*Fox v. Mackay*, 54.)

CORPORATIONS (Continued).

8. **CONSTRUCTION AGAINST PLEADER—RULE DE MINIMIS.**—Under the rule that pleadings are to be construed against the pleader, it may be assumed that the allegation of "less than seventy per cent" is satisfied by a shortage of the smallest fraction of one per cent, and that the rule of *de minimis* would bar a recovery. (Id.)
9. **CONSTRUCTION OF CONTRACT—AVERAGE PERCENTAGE.**—The contract with the milling company for the yielding of "not less than seventy per cent of the pulp assay" of the ores, rock, and earth worked is not to be construed as requiring seventy per cent of the pulp assay of each ton worked, but imports that upon a fair and honest milling of the ore the milling company was bound to return an average of at least seventy per cent of the pulp assay. Where it appeared that for four specified months the return to the mining company was less than seventy per cent of the pulp assay, but that the average of seventy per cent for the entire time was made up in the succeeding months, such average percentage is within the stipulation of the contract. (Id.)
10. **MINING CORPORATION—ACTION BY STOCKHOLDER—ALLEGED FRAUD IN MILLING OF ORE—QUESTIONABLE FAITH OF PLAINTIFF.**—In an action by a stockholder of a mining corporation for an accounting of ores claimed to have been fraudulently milled as the result of an alleged conspiracy between certain stockholders of the mining company, who had organized the milling company, the good faith of the plaintiff in bringing the action is open to question, where it appears that he purchased five shares of the stock, and held it but a single month, for the purpose of bringing the action, while the holders of the remaining two hundred and fifteen thousand nine hundred and ninety-five shares appear to be satisfied with the past management of the corporation, and that the plaintiff also brought five similar actions against other corporations on the same day. (Fox v. Mackay, 57.)
11. **FINDINGS AND EVIDENCE AGAINST FRAUD.**—Findings supported by evidence showing that the contract for the milling of the ore was fair, and that the milling was honestly done, and yielded an average per cent of the pulp assay in excess of that required by the contract, though in certain months of incompleting runs the yield was less, and that none of the stockholders of the mining company who organized the milling company were directors of the former, or participated in or controlled in any manner its action in the making of the contract, are a bar to any recovery by the plaintiff. (Id.)
12. **CONCEALMENT OF INTEREST IN MILLING CONTRACT—DUTY OF STOCKHOLDERS.**—The stockholders of the mining corporation, merely as such, owed no duty to inform it of their interest in the contract made with the milling company, and the concealment of such interest is not a fraud *per se* upon the mining company, if its action in making the contract was not controlled by them in any manner. (Id.)

CORPORATIONS (Continued).

13. **LIABILITY OF STOCKHOLDERS—INDEBTEDNESS TO BANK—OVER-DRAFTS—NOTE—STATUTE OF LIMITATION.**—A corporation is liable upon an implied promise to pay overdrafts to a bank when made; and its stockholders are liable on the indebtedness thus accruing to the bank upon the daily balances against the corporation shown by the account. A note given in renewal or extension of the indebtedness of the corporation for overdrafts cannot operate to renew or extend the liability of the stockholders, or prevent the statute of limitations from running against it. (*Santa Rosa National Bank v. Barnett*, 407.)
14. **GENERAL DEPOSITS AFTER OVER-DRAFTS—PRESUMPTION OF PAYMENT—ACCOUNT NOT MUTUAL.**—General deposits made by the corporation in a bank to which it is indebted for over-drafts, of sums not greater than the balance of indebtedness, are presumed to be made as payments thereupon, and do not make the account mutual, open and current, within the statute of limitations. The fact that the account started with a credit cannot alter the nature of the indebtedness for over-drafts, nor render the account of such indebtedness and of payments thereupon a mutual, open and current account. (Id.)
15. **LIMITATIONS OF STOCKHOLDER'S LIABILITY—CONSTITUTIONAL LAW.**—Section 359 of the Code of Civil Procedure, limiting the liability of the stockholders of corporations, is not inconsistent with section 3 of article XII of the state constitution, imposing such liability, and was continued in force by section 1 of article XII of the constitution, continuing in force all laws not inconsistent therewith. (Id.)
16. **CONSTRUCTION OF CODE.**—There is no conflict between section 359 of the Code of Civil Procedure and section 309 thereof, relating to the liability of directors of corporations, or section 348 thereof, relative to actions against persons and corporations with whom money has been deposited. (Id.)
17. **AMENDMENT OF COMPLAINT—DISCRETION—RULING WITHOUT INJURY.**—The refusal of the court to allow the complaint to be amended to conform to claimed proof that the indebtedness evidenced by the note upon which the stockholders were sued was for a balance due upon a mutual, open and current account between the corporation and the plaintiff was within the discretion of the court, and the ruling will not be disturbed if no abuse of discretion appears. The ruling is without injury where the evidence shows that the cause was tried as fully as if the proposed matter of amendment had been pleaded. (Id.)
18. **LIABILITY OF STOCKHOLDERS—CREATION OF LIABILITY FOR SERVICES—STATUTE OF LIMITATIONS.**—The liability of a corporation and of the stockholders thereof for the services of an attorney employed to defend the corporation in an action brought against it is not created until the rendition of the services performed by the at-

CORPORATIONS (Continued).

torney; and the statute of limitations does not begin to run against the stockholders of the corporation from the date of the contract of employment of the attorney. (*Johnson v. Bank of Lake*, 6.)

19. **STATUTE OF LIMITATIONS—NOTE OF CORPORATION—LIABILITY OF STOCKHOLDERS FOR ORIGINAL CREDIT.**—In applying the statute of limitations to the liability of the stockholders, a note given by the corporation in renewal or continuance of an original credit given to the corporation for overdrafts, is to be disregarded, and the liability of the stockholders is to be deemed created or incurred only by the original credit to the corporation. (*London & S. F. Bank v. Parrott*, 472.)

See Guaranty, 12.

COSTS.

APPEAL FROM JUDGMENT—PRESUMPTION.—Where no costs were awarded to the defendants, whose lands were condemned, and the appeal is from the judgment, upon the judgment-roll alone, and there is nothing in the record to show whether a cost bill was presented or what items of cost were claimed it must be presumed in support of the judgment that appellant failed to present a cost bill showing items property chargeable to plaintiff. (*Alameda County v. Crocker*, 101.)

See Pleadings, 13.

COUNTIES.

1. **DIVISION—PRIOR RAILROAD TAXES—IMPROPER REASSESSMENT—RECOVERY OF LOSS.**—Upon the division of a county, with an agreed basis of apportionment of assets, which did not include prior unpaid railroad taxes, the validity of which was disputed, and which had not then been reassessed, but which were subsequently improperly reassessed for the previous years to each of the counties, upon the basis of their respective railroad mileage, and paid upon that basis, the original county may recover from the new county the difference between the amount of taxes received by the complainant, and the amount which it would have had, if the taxes had been wholly reassessed to it, and divided between them upon the agreed basis of apportionment, with interest upon such difference. (*County of San Diego v. County of Riverside*, 495.)
2. **PRESENTATION OF CLAIM.**—The claim for reimbursement having been presented by the original county to the new county for allowance, and wholly rejected, it need not be again presented before bringing an action thereupon. (*Id.*)
3. **PLEADING—INVALIDITY OF ORIGINAL ASSESSMENT—GENERAL DEMURRER.**—Where the complaint showed that the railroad taxes were long delinquent, owing to a question as to their validity, and that reassessments made by the state board of equalization were accepted

COUNTIES (Continued).

- and acted upon by the railroad company by payment of the taxes, it cannot be objected upon general demurrer that the invalidity of the original assessments was not directly alleged. (Id.)
4. **DUTY OF STATE BOARD OF EQUALIZATION—REASSESSMENT AND APPORTIONMENT.**—It is the duty of the state board of equalization in making a reassessment of railroad taxes, to take the place of an invalid assessment of a previous year, to make their apportionment to the counties as they existed at the time of the invalid assessment, and not at the time of the reassessment. (Id.)
 5. **LIEN FOR TAXES NOT CREATED BY ASSESSMENT.**—The lien for the taxes justly leviable upon the property of a railroad company attaches on the first Monday of March in each year, and is not created by the assessment, which is merely one of the steps for the enforcement of the lien; and whenever a valid assessment or reassessment is made for that year, the taxes become payable to the county in which the roadbed was included when the lien attached for the taxes of that year. (Id.)
 6. **AMBIGUITY OF COMPLAINT—MISTAKE IN FIGURES.**—The ambiguity of the complaint caused by a mistake in figures, causing a discrepancy of allegation as to the number of miles taxed in the new county, which may be corrected by other figures given in the complaint, cannot be reached upon general demurrer. (Id.)
 7. **FAILURE OF COMMISSIONERS TO DIVIDE UNPAID TAXES—ERROR IN FAVOR OF APPELLANT.**—The objection that the commissioners failed to divide the unpaid railroad taxes for previous years, the validity of which was disputed, and which had not been reassessed, cannot preclude a recovery by the original county of its alleged proper proportion of the taxes received by the new county, when subsequently reassessed and paid. If such failure made a subsequent division impossible the original county would be entitled to recover and keep all the taxes for those years; and the new county, upon appeal, from a judgment for a portion of the taxes improperly received by it, cannot complain of error in its favor. (Id.)

COUNTY CLERK. See Office and Officers, 1-3.

CRIMINAL LAW.

1. **ASSAULT WITH INTENT TO MURDER—QUESTION OF FACT.**—Upon the trial of a charge of assault with intent to commit murder, the question as to the intent with which the acts were done by the defendant, is one purely of fact, to be determined from all the circumstances of the case surrounding the assault. (People v. Watson, 342.)
2. **ASSAULT WITH DEADLY WEAPON.**—Under a charge of assault with intent to commit murder, the defendant may, if the evidence justifies it, be convicted pursuant to section 245 of the Penal Code, of an

CRIMINAL LAW (Continued).

assault with a deadly weapon, or by means and force likely to produce great bodily injury. (Id.)

3. **IMPROPER OMISSION IN INSTRUCTION.**—An instruction to the jury under a charge of assault with intent to commit murder, that the form of their verdict must be either not guilty, or guilty as charged, or guilty of an assault, is prejudicially erroneous in omitting the possibility of a conviction under section 245 of the Penal Code, where the evidence will justify such conviction. Such omission is the equivalent of a refusal to instruct that such conviction could be had under evidence justifying it. (Id.)
4. **CHARGE TO JURY—CONDITIONS AND LIMITATIONS.**—Each sentence of a charge to the jury in a criminal case need not contain all the conditions and limitations to be gathered from the entire text. (People v. Neber, 560.)
5. **BURGLARY—CHARGE AS TO POSSESSION OF STOLEN PROPERTY—MATTER OF FACT.**—A charge to the jury upon the trial of an accusation of burglary with intent to commit larceny, in reference to the possession of stolen goods, which at the outset showed that it was based hypothetically upon the fact of such possession being established beyond a reasonable doubt, does not proceed to charge the jury upon matters of fact, because such hypothesis is not repeated in the subsequent discussion of the effect of evidence of such possession, and as to when it is to be considered as a circumstance in connection with other circumstances in the case in arriving at a verdict. (Id.)
6. **CAUTION TO JURY.**—Such charge could not mislead the jury when they were in a subsequent part of the charge expressly cautioned against understanding the court as intimating any opinion upon any fact in the case, or upon the weight of the evidence. (Id.)
7. **FORGERY—SUFFICIENCY OF INFORMATION—FORGING "NAME" TO CHECK.**—An information for forgery which substantially conforms to the statute, and charges the forging of the "name" of a certain person to the check, a copy of which is set forth in the information, showing that such name was signed to the check, and also charges that the defendant falsely uttered and passed the check as true and genuine, with intent to defraud a third person named, knowing the same to be false, forged, and counterfeit, states facts sufficient to constitute a public offense in such manner as to enable the defendant, as a man of common understanding, to know what was intended, and to enable him fully to prepare for his defense; and a demurrer thereto is properly overruled. (People v. King, 369.)
8. **DEFECT IN FORM—SUBSTANTIAL RIGHT NOT PREJUDICED.**—Any defect in form in such information is not specifically averring in the first part thereof, that the "check," as an instrument or the "signature" thereof, was forged and counterfeited, is not such as tended to prejudice any substantial right of the defendant. (Id.)

CRIMINAL LAW (Continued).

9. **EVIDENCE—CONFESSIONS OF DEFENDANT—INDUCEMENT—BURDEN OF PROOF.**—The burden is on the prosecution to show that confessions of a defendant charged with crime were made voluntarily and without previous inducement; and where it appears that the defendant at first denied his guilt, and afterward confessed to the sheriff under improper representations and inducements held out to him, it must be shown that confessions made to the deputy sheriff and to the jailer were not only without inducements held out by them, but also that they were not induced by those held out to him by the sheriff, in order to justify their admissibility. (*People v. Castro*, 521.)
10. **SUFFICIENCY OF OBJECTIONS TO EVIDENCE—MOTION TO STRIKE OUT.**—Where the court refused to permit the defendant to show that confessions offered in evidence were made under promises of exemption from a heavy penalty, and overruled his objection that the state must show more than that no inducements were held out at a particular conversation, such rulings and exceptions were sufficient, without repetition, to cover all confessions thereafter offered, and to justify a motion to strike out all evidence of confessions to various persons not shown to have been induced by representations which were proven to have been held out by the sheriff. (*Id.*)
11. **HOMICIDE—CHALLENGE TO JUROR—NEWSPAPER REPORTS—PRIVATE STATEMENTS.**—A challenge to a juror upon the trial of a defendant accused of murder, for actual bias, should be sustained, where the juror upon his voir dire states that besides reading newspaper accounts of the killing he had heard statements of persons whom he had known for years, and who said they were true, and he believed them, though they might be mistaken, and that he would commence the trial of the case with an impressional opinion unfavorable to the defendant from what he had read and heard, subject to be changed upon the introduction of almost any evidence that would disprove it. (*People v. Miller*, 44.)
12. **RIGHT TO IMPARTIAL JURY—EXCEPTION TO COMMON-LAW RULE—AFFIRMATIVE SHOWING.**—The only exception to the common-law rule that the defendant is entitled to an impartial jury is declared in section 1076 of the Penal Code; and to sustain such exception the opinion of the juror must affirmatively appear to be founded alone upon public rumors, statements in public journals, or common notoriety. (*Id.*)
13. **SELF-DEFENSE—NECESSITY INDUCED BY FAULT—USE OF INSTRUCTION DISAPPROVED.**—The instruction upon the law of self-defense, as to necessity induced by the fault of the defendant, taken bodily from the cases of *People v. Kennett*, 114 Cal. 18 and *People v. Roemer*, 114 Cal. 51, is unsound, aside from the qualification therein express and though not erroneous, if given with that qualification, no good purpose can be subserved by giving it, and it should never be given. (*Id.*)

CRIMINAL LAW (Continued).

14. **HOMICIDE—SELF-DEFENSE—DISPUTED RIGHT TO USE OF ROAD—OVERT ACT.**—In case of a homicide occasioned by dispute over the right to the use of a road across the premises of the deceased, where each of the parties was fully armed, and determined at all hazards to maintain his claim, the question of self-defense is independent of the respective rights of the parties to the road; and the one who by some overt act first caused a reasonable apprehension of danger of loss of life or limb to the other, must take the consequences. (*People v. Harris*, 94.)
15. **CONVICTION OF MANSLAUGHTER—SUPPORT OF VERDICT.**—Where there is evidence, in such a case from which the jury might find that, at the time of the killing, the deceased had committed no overt act which justified the killing, a verdict convicting the defendants of manslaughter will not be disturbed upon appeal. (*Id.*)
16. **HOMICIDE—INSTRUCTION—REASONABLE DOUBT.**—Upon the trial of a defendant charged with murder where the court has given a full and correct instruction upon the subject of reasonable doubt, it is not erroneous, or objectionable as being argumentative in form, to instruct the jury that "the doubt which acquits a defendant on trial on a charge of crime must be a reasonable doubt in the sense mentioned and no other." (*People v. Winters*, 325.)
17. **INSTRUCTION AS TO DISTRUST OF FALSE WITNESS.**—An instruction "that a witness ascertained or appearing to be willfully false in one part of his testimony, as to the truth or falsity of a given proposition, is to be distrusted in other parts," though somewhat out of the ordinary form, is not substantially objectionable. (*Id.*)
18. **INSTRUCTION AS TO ALIBI—DEFENSE—PROOF—REASONABLE DOUBT.**—A statement in an instruction upon the subject of alibi, that "such a defense is as proper and legitimate, if proved, as any other defense," is not strictly correct. An alibi is not matter of defense; and the words, "if proved," standing alone, would be misleading. But where such statement is immediately followed by the statement to the jury that if the evidence is sufficient to raise a reasonable doubt as to whether the defendant was in some other place when the crime was committed, or not present at the time and place of its commission, they should give him the benefit of the doubt and acquit him, the instruction as a whole, is not misleading. (*Id.*)
19. **REQUESTED INSTRUCTION AS TO ALIBI.**—An instruction requested by the defendant upon the subject of alibi, which assumes to give defendant the benefit of any doubt raised, omitting the qualification of reasonable doubt, is properly refused. (*Id.*)
20. **ARGUMENTATIVE INSTRUCTION—IDENTITY OF DEFENDANT.**—An argumentative instruction as to the identity of the defendant, based

CRIMINAL LAW (Continued).

upon the facts, and not containing any proposition of law, is properly refused. (Id.)

21. **INSTRUCTION AS TO DEFENDANT'S TESTIMONY—PROVINCE OF JURY.**—A requested instruction that the jury "are not permitted under the law to discredit or reject the testimony of the defendant, simply on the ground that he is accused and on trial on a criminal charge," is properly refused as being upon matter of fact, and not of law, and as invading the province of the jury, who are the sole judges of the credit to be given to the testimony of any witness. (Id.)
22. **CONTINUANCE—INSUFFICIENT SHOWING.**—A continuance on the ground of the absence of witnesses for the defendant is properly refused, where the affidavits therefor do not show that the defendant has used any diligence to secure their attendance, or that their attendance could be procured at a subsequent day, if the continuance had been granted. (Id.)
23. **EVIDENCE—DECLARATIONS OF COCONSPIRATOR—HEARSAY—ERROR WITHOUT PREJUDICE.**—Declarations of a coconspirator with the defendant made after his arrest, and not in the presence of the defendant, as to whence he came, where he was going, and what was his business, are inadmissible hearsay, but if there is nothing in the declarations tending to implicate either the defendant or the declarant, the error in admitting them is without prejudice. (Id.)
24. **IDENTIFICATION OF PISTOL PURCHASED BY DEFENDANT.**—Where the homicide was in fact committed by the coconspirator, it is proper to identify a pistol found upon him as a pistol purchased by the defendant, as tending to connect the defendant with the commission of the crime. (Id.)
25. **HOMICIDE—EVIDENCE—MARKED PHOTOGRAPHS—DISCRETION.**—Upon the trial of a defendant accused of murder, the use in evidence of photographs of the scene of the homicide, taken by the prosecuting officers, with certain places marked thereon as pointed out by witnesses, is within the discretion of the court. (People v. Crandall, 129.)
26. **PHOTOGRAPHS AS DIAGRAMS—HEARSAY—PROOF OF CORRECTNESS.**—Like any other diagrams, the value of the photographs must be determined by the jury from all the evidence; and they are not inadmissible hearsay merely because the places marked were pointed out by witnesses, if they testify that they were correctly pointed out, and the correctness of the marking is proved. (Id.)
27. **PHOTOGRAPHS TAKEN BY PROSECUTION—UNSEEMLY TESTIMONY.**—Although it may not be erroneous to permit the use as diagrams of photographs taken by the prosecuting officers, yet, their office being quasi judicial, it would be better if the proof were furnished by other witnesses. It is unseemly that the same person should be both advocate and witness. (Id.)

CRIMINAL LAW (Continued).

28. **IMPROPER IMPEACHMENT—CROSS-EXAMINATION AS TO IMMORAL CONDUCT.**—Questions asked upon cross-examination of the wife of the defendant, for the avowed purpose of impeachment as to whether she did not live by prostitution, and as to particular times and places, and particular men, and special modes of solicitation for immoral purposes, are highly improper; and the asking of them is prejudicial error as insinuating damaging charges against the witness tending to disgrace and degrade her. (Id.)
29. **COLLATERAL INQUIRY—ANSWERS CONCLUSIVE—ARGUMENT OF DISTRICT ATTORNEY.**—The inquiry as to the grossly immoral conduct of the defendant's wife, being wholly collateral to the issues, and the insinuated charges being such that they could not be rebutted otherwise than by the denial of the witness, her denials in answer to the improper questions are conclusive, and the prosecution could not contradict them; nor could the district attorney properly insinuate in argument to the jury that her answers to the questions were not true. (Id.)
30. **RAPE—EVIDENCE—CONSENT TO INTERCOURSE WITH OTHER MEN.**—Upon the trial of a person charged with rape, evidence is admissible to show that the prosecutrix, previous to the time of the alleged commission of the offense charged, had consented to the having of sexual intercourse with other men. (*People v. Shea*, 151.)
31. **CASE AFFIRMED—STARE DECISIS.**—*People v. Benson*, 6 Cal. 221, affirmed, as having evidenced the law of this state for many years, and as being supported by respectable authority, though the weight of authority may be to the contrary. (Id.)
32. **DETERMINING PROBABLE CAUSE FOR APPEAL—ABSENCE OF TRIAL JUDGE—TEMPORARY STAY.**—Where, owing to the absence of the trial judge on vacation, no application can be made to him for a certificate of probable cause for appeal from a judgment of imprisonment in the state prison, and other judges of the same court refuse to grant a stay of proceedings during his absence, as they might do, the appellate court will not make the usual order staying proceedings until the record can be presented to this court, but will order a stay until the trial judge returns and hears the application for a certificate of probable cause or until some other judge of the same court, appointed to act in his place, has heard and decided it. (*People v. Clark*, 251.)
33. **RIGHT OF APPELLANT.**—The appellant from a judgment of conviction of a felony has a right to have it determined by the trial court, or by a justice of this court, whether there is probable cause for his appeal and to have a stay of proceedings in a proper case; and is entitled to a reasonable stay until the matter can be determined. (Id.)

See Estates of Deceased Persons, 1, 2.

DAMAGES.

1. **ACTION FOR DEATH—ADULT COLLATERAL HEIRS—FAILURE OF PROOF—NOMINAL DAMAGES—INSTRUCTION.**—In an action for a death brought by the adult collateral heirs of the deceased, the mere fact that they are such heirs does not tend to show pecuniary damage; and in the absence of other proof tending to show actual damages, or, at least, provable loss, resulting to them from the death, the jury should be instructed that their recovery must be limited to nominal damages. (*Burke v. Arcata & Mad River Railroad Company*, 364.)
2. **SPECULATIVE POSSIBILITIES OF BENEFITS.**—Mere speculative or conjectural possibilities of benefits to the parties complaining are not a proper basis for an estimate of damages resulting from a death. (*Id.*)
See Guaranty, 1, 2; Negligence, 10; New Trial, 15-17, 25, 26.

DEBTOR AND CREDITOR. See Insolvency; Joint Debtors; Payments.

DEDICATION.

1. **PUBLIC PARK—DEDICATION—INTENTION—QUESTION OF FACT—CONFLICTING EVIDENCE.**—The dedication *in pais* of a public park, or of land to any public use, can never be a matter of law. The owner's intention is the all important element in creating a dedication, and is a question of fact; and a finding of "no dedication" cannot be disturbed where the evidence is conflicting, though the preponderance of the evidence may be in favor of the dedication. (*City of Los Angeles v. Kysor*, 463.)
2. **RECORDED MAP SHOWING PARK—SALES OF LOTS—OFFER OF DEDICATION—PUBLIC ACCEPTANCE—REVOCATION.**—The record of a map, with the designation of streets and parks thereon, and the sale of lots by such map, whatever effect it may have upon the individual rights of the lot-owners, cannot conclusively establish the dedication of a park designated thereon to public use; but, treating it as an offer of dedication thereof, a finding of "no dedication" will be sustained, where no public acceptance of the offer is established, and the evidence tends to show a revocation of the offer. (*Id.*)
3. **EVIDENCE OF REVOCATION—CONTRACT OF SALE.**—A contract for the sale of a park tract designated as such upon the recorded map is evidence tending to show a revocation of the offer to dedicate the park to public use. (*Id.*)
4. **ACCEPTANCE BY PUBLIC—PARTIAL USE FOR PLEASURE PURPOSES—PRIVATE OWNERSHIP.**—Where there was no evidence of any act or acceptance of the park by the city, the mere occasional use of a portion of the grounds for picnics and other pleasure purposes, being consistent with private ownership, which was in fact exercised

DEDICATION (Continued).

over, the tract, cannot establish an acceptance of the park as such by the public, against a finding of "no dedication." (Id.)

5. **IMPLIED ACCEPTANCE—FINDING AGAINST ACCEPTANCE.**—An acceptance of an offer to dedicate may be presumed or implied in many cases; yet a finding of fact that there never was an acceptance will rarely be set aside by an appellate court, where the claim of acceptance is based upon presumption or implication alone. (Id.)
6. **DEDICATION OF STREET—INTENTION ESSENTIAL—INSUFFICIENT FINDINGS—PROBATIVE FACTS—USER OF WAY—LICENSE.**—The intention of the owner of land to dedicate part thereof as a public street is essential to a dedication; and findings of mere probative facts, without the finding of a dedication or of an intent to dedicate, and which are not inconsistent with the absence of such intention, and may indicate a mere license to the public to use an open passageway for travel, without adverse user thereof by the public, are insufficient to establish the dedication of the way as a public street. (*Niles v. City of Los Angeles*, 572.)
7. **GENERAL FINDING.**—A general finding that the way was a public street, placed among the conclusions of law, and evidently intended as a deduction from previous probative facts found, cannot prevail, if not sustained by the probative facts. (Id.)
8. **ADVERSE USER BY PUBLIC.**—Where the dedication of a highway is sought to be established by user by the public, it must be shown that the user was adverse with the knowledge of the owner, and the user was adverse with the knowledge of the owner; and the user must be of such duration that the public interest and private right would be materially impaired if the dedication were revoked and the use by the public discontinued. (Id.)
9. **MAKING AND FILING OF MAP—OFFER OF DEDICATION—ACCEPTANCE—REVOCATION.**—The making and filing of a map designating certain streets thereon, is only an offer to dedicate such streets to the public, and unless the offer is accepted by the public within a reasonable time, the owner may resume possession and control of the property, and thereby revoke his offer. (Id.)
10. **INSUFFICIENCY OF EVIDENCE.**—Evidence showing that since the opening by adjoining owners of a strip used as a passageway, it was cultivated by the owners almost every year—that fruit and other trees were placed thereon by them, that taxes were paid by them to the city upon the land, that on an assessment map of another street the strip was shown to be private land, and not a street, and was assessed to the owners thereof, and that the strip had never been improved, graded, or accepted as a street by the public authorities, is wholly insufficient to support a finding that the strip was dedicated or abandoned to the public as a street. (Id.)
11. **RESERVATION OF WAY—PRESUMPTION.**—The reservation in a deed of a strip of land "for canal or road purposes, both or either,"

DEDICATION (Continued).

so far as the language discloses, is for the benefit of the grantor alone; and in such case, or where the way is for the benefit of both parties to the deed, no presumption arises of any intent to dedicate the way to public use as a highway. (*Taft v. Tarpey*, 376.)

12. **EFFECT OF PUBLIC USER.**—It is only by actual user, and to the extent of such user by the public as a highway, that the public can acquire rights in any portion of a strip reserved for road and ditch purposes in a deed; and no such rights result from the terms of the deed. (*Id.*)
13. **RESERVATION OF ADJOINING STRIPS—ROAD AND DITCH PURPOSES—USER—INJUNCTION.**—Where similar reservations are made by the same grantor in deeds of adjoining lands to different persons at different times of two adjoining strips, one upon each tract, and each thirty feet in width, for road and ditch purposes, and where the junior grantee occupies the outer half of the strip upon his land for an irrigating ditch, and for trees and vines, for over six years, and only the middle thirty feet of the adjoining strips was in fact used by the first grantee and by the public for road purposes during that period, he may be enjoined thereafter from threatened interference with such ditch, trees and vines, upon the alleged ground that both strips were wholly dedicated to public use as a highway by force of the reservations. (*Id.*)
14. **EVIDENCE—WIDTH OF LAND OCCUPIED BY DITCH AND TREES.**—Both parties to the deeds of the adjoining lands having acted upon the assumption that they were keeping within their respective rights, and fifteen feet having been left upon each side of the road, evidence is admissible to show that the width of the land continuously occupied by the ditch, trees and vines was fifteen feet. (*Id.*)
15. **CUSTOM OF GRANTOR AS TO RESERVATIONS—DECLARATIONS—CONVEYANCE TO WITNESS.**—Declarations of the common grantor as to his rule or custom in making reservations in deeds of lands are not competent; and it is not error to exclude a prior deed to a witness containing a similar reservation to those contained in the deeds to the parties to the injunction suit. (*Id.*)

See Van Ness Ordinance.

DEED.

1. **DEED FROM FATHER TO DAUGHTER—DELIVERY—SUPPORT OF FINDING.** The evidence reviewed, and held sufficient to support a finding that a deed of the home place from a father to his daughter was delivered to her by him during his lifetime. (*Reed v. Smith*, 491.)
2. **MODE OF KEEPING DEED—DEMAND FOR REDELIVERY—LOSS—RECOVERY AFTER DEATH.**—Such finding is not overcome by evidence that,

DEED (Continued).

after the delivery of the deed, it was kept in the usual manner among papers belonging to both father and daughter, which were subsequently placed together in her valise; that the father, some years thereafter, through opposition to his daughter's marriage, demanded the deed back, and that she could not find the deed or valise containing it; that, after her father's death, she did not set up a claim to the property when his will was read; and that the valise containing the deed and other papers was subsequently found, and the deed recovered by her. (Id.)

3. **JOINT OCCUPATION—ADVERSE HOLDING BY FATHER.**—The fact that after the execution and delivery of the deed to his daughter, the father remained upon the home place, occupying it with her, did not constitute an adverse holding, prior to the time when he assumed a position hostile to her title. (Id.)

4. **DELIVERY TO THIRD PERSON—DEATH OF GRANTOR—CONTROL OF DEED.**—In order to sustain the delivery of a deed to a third person, to be delivered to the grantee upon the death of the grantor, it must appear that the grantor parted with the possession and control of the deed for all time. (Kenney v. Parks, 146.)

5. **MUTUAL DEEDS OF HUSBAND AND WIFE—ESCROW—RETURN OF DEED OF SURVIVOR—TITLE NOT VESTED.**—Where a husband and wife each executed a deed to the other, and both deeds were delivered to the cashier of a bank, with the understanding that upon the death of either the deed to the survivor should be recorded, and the deed of the survivor returned as ineffective, no escrow was created by the delivery of the deeds, though it was improperly called such, and no title vested under either of them. (Id.)

See Alimony, 2-4; Fraud, 2-4, 6, 8, 10; Injunction, 1, 3; Trust Deed; Vendor and Vendee.

DEPOSITION. See Evidence, 5, 6.

DITCH. See Easement.

DIVORCE.

1. **MAINTENANCE OF CHILDREN—OMISSION IN DECREE—SUBSEQUENT ORDER—JURISDICTION.**—In an action, for divorce, where the custody of the children was awarded to the wife without any provision in the decree for their maintenance, the court, having no jurisdiction to act subsequently under section 139 of the Civil Code, has jurisdiction, under section 138 of that code, to give a subsequent direction "for the custody, care, and education of the children," and to provide for the expenses reasonably to be incurred for their "care and education." (McKay v. McKay, 65.)

2. **CONSTRUCTION OF CODE—PROSPECTIVE ACTION.**—The provisions of section 138 of the Civil Code are in their nature prospective; and the use of the term "direction" implies that the action of the court

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DIVORCE (Continued).

is to be limited to the "care and education" which the children are subsequently to receive under its direction. (Id.)

3. **LIMITED POWER OF COURT—BENEFIT OF CHILDREN—REIMBURSEMENT OF PAST EXPENSES.**—The jurisdiction retained by the court under section 138 of the Civil Code is to be exercised only in behalf of the children; and if they have been already sufficiently cared for by the voluntary act of the mother, or of other persons, the court is not empowered in an order made for the first time after judgment to compel the father or reimburse them for these past expenses. (Id.)
4. **VOLUNTARY EXPENSES BY STEPFATHER—PRESUMPTION—REIMBURSEMENT NOT REQUIRED.**—Where it appears that subsequently to the decree and to the remarriage of the divorced wife, the children were received into the family of the stepfather, and the expenses of their care and education were voluntarily incurred by him, it must be presumed, under section 209 of the Civil Code, that he supported them as a parent, and they are not liable to him for their support. The father is not bound to reimburse the stepfather therefor; and the court cannot order such reimbursement under section 138 of the Civil Code. (Id.)

See Alimony.

EASEMENT.

1. **EASEMENT FOR DITCH—ADVERSE USER—CESSATION OF USE.**—An easement for a ditch acquired by adverse user is lost and extinguished by complete disuse for the period prescribed for acquiring title by prescription. (*City of Los Angeles v. Pomeroy*, 420.)
2. **PATENT TO SUCCESSORS OF MEXICAN GRANTEE—FREEDOM FROM LEGAL EASEMENT—EQUITY.**—A United States patent issued without reservation to the successors of a Mexican grantee, to whom the whole rancho was conveyed without reservation, does not inure to any person claiming under a grant of an easement of a ditch from the original grantee; but the patentee acquired the whole legal title free of every sort of legal servitude. The grantee of such easement has at most a mere equity, which must be alleged and proved as such. (Id.)

See Way.

EJECTMENT.

1. **WRIT OF RESTITUTION—AUTHORITY OF SHERIFF.**—Under a writ of restitution issued upon a judgment for the plaintiff in an action of ejectment, the sheriff is authorized to remove from the land the defendants and all persons found thereon, whose possession was derived under the defendants or either of them. (*Scheerer v. Goodwin*, 154.)
2. **PRESUMPTION AS TO POSSESSION UNDER DEFENDANTS—BURDEN OF PROOF—POSSESSION UNDER STRANGER.**—The burden of proof is up-

EJECTMENT (Continued).

on all persons coming into possession subsequent to the commencement of the action of ejectment to show affirmatively that their possession is rightful, and under a title not determined in the action, and was not taken by collusion with the defendants; and, in the absence of a showing to the contrary, it will be presumed that they came in under the defendants. This presumption is not overthrown by showing that they came in under a stranger to the action, unless it is also shown that such stranger was in possession at or prior to the commencement of the action. (Id.)

3. INJUNCTION AGAINST EXECUTION OF WRIT—ABSENCE OF TITLE—

COLLUSIVE ENTRY.—An injunction cannot be maintained to enjoin the execution of the writ of restitution, in favor of a possessor claiming under a deed from a third person dated prior to the commencement of the action of ejectment, where it appears that such third person had no title to the premises, and merely had a conveyance from a defendant in ejectment after he had parted with his rights, and which was intended as a security for indebtedness; and that the entry of the plaintiff in the injunction suit, after the commencement of the action of ejectment, was by collusion with the defendant in that action, with intent to deprive the plaintiff therein of the fruits of his judgment. (Id.)

4. EVIDENCE—POSSESSION OF GRANTOR—IMPEACHMENT.—Where the

defendant in the ejectment suit testified for the plaintiff in the injunction suit that he had delivered the possession of the premises to the plaintiff's grantor prior to the commencement of the ejectment suit, he may be impeached by proof that on the trial of the ejectment suit he testified that he himself had been in possession of the premises for about two years under a lease from the city, which lease described the premises in controversy, and was the only lease he had taken from the city. (Id.)

See Boundaries.

ELECTIONS.

1. MUNICIPAL ELECTION—CLOSING OF POLLS—CONSTRUCTION OF CHARTER.—

In a city charter providing that all the provisions of law regulating elections for state and county officers shall apply so far as practicable to elections under the charter, and providing further specifically that the polls shall be opened at such hour as may be designated by the mayor and common council in the notice of election, but in no case later than 2 o'clock P. M., and that they shall not be closed until sundown, the special provision for the time of closing of the polls will prevail over a general provision of the election laws referred to for closing polls at state and county elections at 5 o'clock P. M. (People v. Hill, 16.)

ELECTIONS (Continued).

2. **CONFLICT BETWEEN SPECIAL AND GENERAL LAW.**—The charter being a law for a special case, is not in conflict with the general law providing otherwise; and an intent that the general law shall supersede the charter provision as to the time for closing the polls cannot be inferred from a general law which by its terms is applicable to state and county elections only, and which is only made applicable generally so far as practicable by the same charter which specially provides differently therefrom, as to the time of opening and closing of the polls at municipal elections. (Id.)
3. **ELECTION OF MAYOR—PREMATURE CLOSING OF POLLS—REJECTION OF VOTE OF WARDS.**—In determining the election of a mayor, under a charter providing for keeping open the polls until sundown, the vote of wards which closed the polls at 5 P. M. is properly rejected, although the majority of the voters of the city are thereby disfranchised. The election in such wards is to be treated as illegal and void, and as if no election was held therein; and the vote in a remaining ward, in which the polls were closed at sundown, must determine the election. (Id.)
4. **ELECTION CONTEST—APPEAL FROM JUDGMENT—STAY OF PROCEEDINGS—MANDAMUS.**—Upon appeal from a judgment rendered in favor of the contestant in an election contest, the giving of the three hundred dollar bond operates as a stay of proceedings; and mandamus will not lie to compel the defendant, who, prior to the judgment, entered upon the discharge of the duties of the office under his certificate of election, to admit the contestant to the use and employment of the office. (Day v. Gunning, 527.)
5. **JUDGMENT—UNLAWFUL HOLDING OF OFFICE—QUO WARRANTO—CONSTRUCTION OF CODE.**—The judgment in an election contest cannot properly adjudge that the defendant is unlawfully holding the office; and the provision of section 949 of the Code of Civil Procedure, which provides that an appeal does not stay proceedings where the judgment “adjudges the defendant guilty of usurping or intruding into, or unlawfully holding public office,” et cetera, applies only to the judgment in an action of *quo warranto*, or for the usurpation of office, and not to any judgment proper to be entered in an election contest. (Id.)

EQUITY. See Injunction; Jury and Jurors.

ESCROW. See Deed, 5.

ESTATES OF DECEASED PERSONS.

1. **RIGHT OF INHERITANCE—CIVIL DEATH—IMPRISONMENT FOR LIFE.**—The right of inheritance is a civil right, existing only by virtue of the law, and the legislature may make the deprivation of this right a portion of the penalty to be imposed for the commission of a crime. Section 674 of the Penal Code, enacting that “a person sen-

ESTATES OF DECEASED PERSONS (Continued).

tenced to imprisonment in the state prison for life is thereafter deemed civilly dead," has the effect to extinguish his civil rights, generally, including the right of inheritance; and such person cannot be a distributee of the estate of an intestate father who died subsequent to his sentence of imprisonment for life. (Estate of Donnelly, 417.)

2. **CONSTRUCTION OF CODE—EXCEPTIONS NAMED EXCLUSIVE.**—The exceptions named in sections 675 and 676 of the Penal Code are exclusive, and the civil death of the felon destroys every civil right not expressly saved in those sections. (Id.)
3. **COMPENSATION OF EXECUTOR FIXED BY WILL—EXTRA SERVICES—RENUNCIATION OF WILL.**—A will fixing the compensation of an executor in an amount in excess of his legal fees must be deemed to fix the measure of his compensation for all services of every kind to be rendered by him; and no claim for extra services, however beneficial to the estate, can be allowed to the executor unless he has, by a written instrument, filed in court, renounced the provision of the will for compensation, as provided in section 1616 of the Code of Civil Procedure. (Estate of Runyon, 195.)
4. **ADMINISTRATOR'S ACCOUNT—SALE OF PERSONAL PROPERTY—REDEMPTION FROM LIEN—LOSS WITHOUT NEGLIGENCE.**—An administrator is not liable to be charged in the settlement of his account for a loss on the sale of personal property, by reason of having paid a lien thereon in good faith, believing that the property was worth more than the amount of the lien, but which was sold without negligence on his part for less than that amount. It is only in circumstances where the court can say, as matter of law, that a reasonably prudent man might not make the honest mistake of paying out more to free the property from a lien than the property would sell for, after the lien was extinguished, that the administrator can be charged with the loss. (Estate of Armstrong, 603.)
5. **FORECLOSURE OF MORTGAGE OF DECEDENT—COLLATERAL ATTACK FOR ERRORS—LIABILITY OF ADMINISTRATOR—PROOF OF NEGLIGENCE REQUIRED.**—The amount of the judgment rendered upon the foreclosure of a mortgage executed by the decedent, cannot be collaterally attacked for the purpose of charging the administrator with errors therein, without proof of negligence upon his part. (Id.)
6. **INCLUSION OF TAXES—WAIVER OF OBJECTION—PLEADING—PRESUMPTION.**—The technical objection that an amount of taxes included in the decree as having been paid by the mortgagee upon the mortgaged property was not supported by the pleadings, is waived if not urged prior to the decree, and the administrator cannot be charged therewith in his account, where it appears that the amount allowed was correct in fact, and accorded with a stipulation in the mortgage. Negligence cannot be imputed to the administrator by

ESTATES OF DECEASED PERSONS (Continued).

presumption for failure to object to proof of the taxes actually paid by the mortgagee; but it must be presumed, in support of the decree, that the question as to the amount of taxes was heard and determined by the court upon the theory that the complaint was sufficient, and the issue properly before the court. (Id.)

7. **AMOUNT OF INTEREST IN DECREE—INSOLVENCY OF ESTATE—OBJECTION BY DEVISEES.**—Devisees, who, if the estate is insolvent, can have no interest in the question cannot object that the administrator should be charged with an excess of interest allowed in the decree of foreclosure, according to the terms of the note, above the legal rate, after notice to creditors, on account of the insolvency of the estate, where no creditors appear to object thereto. The devisees can raise no objection to the amount of the decree, where it appears that, if the amount of error therein claimed to be charged to the administrator were allowed, there would not be sufficient on hand to pay the creditors. (Id.)
8. **FAILURE TO APPRAISE MORTGAGED PROPERTY—USELESS EXPENSE.**—Where there is no evidence that the real estate of the decedent subject to mortgage could, at any time during the administration of the estate, have been sold for enough to pay off the mortgage upon it, and there is evidence to indicate that in the condition of the real estate market it could not have brought the amount of the mortgage, and that it would have been a useless expense for the administrator to have it appraised, he cannot be charged with negligence in failing to do so. (Id.)
9. **NEGLECT IN SETTLEMENT OF ESTATE—INTEREST, WITH ANNUAL RESTS.**—Where the administrator has been negligent in failing to settle the estate, he is properly chargeable with legal interest on the balance in his hands, with annual rests, until the allowance of his account. (Id.)
10. **FINAL ACCOUNT OF ADMINISTRATOR—DEBT CHARGEABLE AS MONEY—LIABILITY OF SURETIES.**—In the settlement of the final account of an administrator, he is to be charged with a personal debt due from him to the decedent, as money on hand; and his sureties are bound for so much of the debt as he has had the means to pay. (Estate of Walker, 242.)
11. **INSOLVENCY OF ADMINISTRATOR—FICTION OF LAW—INJUSTICE NOT ALLOWED.**—The debt due from an insolvent administrator is not for all purposes to be regarded as money on hand; but it is so regarded by a fiction of law, which can only subsist with justice, and should not be allowed to work injustice either by charging the administrator with contempt or embezzlement, in not paying over moneys not received, and which he was wholly unable to pay, or by charging the sureties with liability beyond the faithful discharge of the duties of the administrator. (Id.)

ESTATES OF DECEASED PERSONS (Continued).

12. **FORM OF DECREE SETTTLING ACCOUNT—SHOWING AS TO DEBT.**—In case of insolvency of the administrator, and his inability to pay the debt to the estate, which has remained uncollected without his fault, the proper form of the decree in settling his final account is to charge him with the entire sum, including the debt due from himself, and then to show what portion of the amount consists of debts due from the administrator to himself. (Id.)
13. **OFFERED PROOF OF INSOLVENCY—DECREE SETTTLING ANNUAL ACCOUNT.** The rejection of offered proof of insolvency upon the settlement of the final account of the administrator, is without injury, where the decree settling the annual account offered by the contestant, shows that the administrator was charged therein, not for money actually received, but for a debt due from him to the estate. Either such offered proof, if admitted, or such decree, entitles the administrator to a final decree showing on its face what portion of the money charged against him is for such personal debt due. (Id.)
14. **OMISSION OF PROPERTY FROM INVENTORY—WRONGFUL CLAIM OF EXECUTOR—REVOCATION OF LETTERS.**—The failure of an executor to inventory property belonging to the estate which, without right, he claims as his own, is such misconduct of the executor as justifies the revocation of his letters testamentary; and the court has jurisdiction for the purposes of the revocation to inquire and determine whether the omitted property belongs to the estate, and whether the executor has, without sufficient reason, asserted ownership thereof in himself. (Estate of Rathgeb, 302.)
15. **ORDER FOR PERSONAL PROPERTY—PRESUMPTION OF BAILMENT—STATUTE OF LIMITATIONS.**—An order given by the decedent upon his tenant for the delivery of the possession of personal property does not establish a gift, and the person who receives such property pursuant to the order must be presumed to have held it as bailee of the decedent; and the statute of limitations would not run in his favor, in the absence of proof of an adverse claim brought to the knowledge of the decedent. (Id.)
16. **ADJUDICATION UPON REVOCATION OF LETTERS—ESTOPPEL OF EXECUTOR—ACTION TO RECOVER PROPERTY.**—The court, though having jurisdiction for the purpose of the revocation of letters testamentary to inquire as to the rightfulness of the claim of the executor to property omitted from the inventory, is not competent in such a summary proceeding to decide finally upon the question of title; and the executor is not estopped by the adjudication in such proceeding from showing title in himself in an action to recover the property for the estate. (Id.)
17. **PROCEDURE FOR REVOCATION—STATEMENT OF CHARGES.**—The statement of the charges of misconduct of the executor, in the petition upon which the court issues an order to the executor to show cause why his letters should not be revoked, is sufficient, without being reiterated in a separate document filed at the hearing. (Id.)

ESTATES OF DECEASED PERSONS (Continued).

18. **SALE OF REAL ESTATE—ORDER TO SHOW CAUSE—SERVICE OF NOTICE.**—A probate sale of real estate made without the order to show cause required by section 1537 of the Code of Civil Procedure, and without the service or publication of notice required by section 1539 of that Code, is invalid and void. (*Campbell v. Drais*, 253.)
19. **WAIVER OF NOTICE TO MINOR HEIRS—AUTHORITY OF APPOINTED ATTORNEY.**—The attorney appointed by the court to represent minor heirs, has no authority to represent them in a proceeding to sell the real estate of the decedent until after the court has obtained jurisdiction of their persons by the service of notice upon them; and he has no authority to waive such notice. (*Id.*)
20. **APPEARANCE OF APPOINTED ATTORNEY—PROOF OF SERVICE OF NOTICE.**—The provision of section 1718 of the Code of Civil Procedure, as it stood in 1874, that the appearance of the appointed attorney is sufficient proof of service of notice on the parties he represents, implies that there must be notice to the parties and service thereof in fact prior to such appearance; and when the contrary appears affirmatively, such attorney could not waive both notice and service. (*Id.*)
21. **AVOIDANCE OF PROBATE SALE—STATUTE OF LIMITATIONS—RECOGNITION OF TITLE OF HEIRS—TENANCY IN COMMON.**—The statute of limitations of three years prescribed by section 1573 of the Code of Civil Procedure, within which the heirs of the decedent may avoid a sale made by an executor or administrator, does not run where it appears that the heirs had no cause of action against the purchaser; and where the purchaser recognized the title of minor heirs, and held and continued to hold for them during their minority and after their majority, as tenant in common with them, they have no cause of action against him and are not barred by that section of the code during such recognition of their title, and holding of the purchaser for them. (*Id.*)
22. **QUIETING TITLE OF HEIRS—NOTICE TO MORTGAGEES OF PURCHASER—DEED UNDER FORECLOSURE—RUNNING OF STATUTE.**—The statute of limitations does not begin to run against an action by the heirs of the decedent to quiet their title, in favor of a defendant who claims title under the foreclosure of a mortgage executed by the purchaser at a void probate sale, and who took the mortgage with notice of the rights of the heirs, until the mortgagee received the sheriff's deed, and attempted to obtain possession thereunder, adversely to the heirs. (*Id.*)
23. **DEFENSE TO FORECLOSURE—CAUSE OF ACTION BY HEIRS.**—The heirs could not set up their paramount title as a defense in the action to foreclose the mortgage; and they were not called upon to commence any action until an adverse right was claimed under the sheriff's deed. (*Id.*)

ESTATES OF DECEASED PERSONS (Continued).

24. **RETURN OF MONEY PAID—ESTOPPEL.**—The return of the portion of the purchase money received by the minor heirs upon distribution of the estate, need not be returned to one who obtained a sheriff's deed under foreclosure of a mortgage against the purchaser at the probate sale, as a condition of quieting their title against him; nor can he claim any estoppel as against the heirs where he took his mortgage with notice of their rights. (Id.)
25. **ORDER CONFIRMING EXECUTOR'S SALE—APPEAL—FAILURE TO SERVE NOTICE UPON PURCHASER—DISMISSAL.**—Upon appeal from an order confirming a sale by an executor, taken by an heir of the decedent, it is not sufficient to serve the notice of appeal upon the executor alone, but it must also be served upon the purchaser at the sale, who is an "adverse party," vested with a right to the property purchased upon the payment of the purchase money, and, for failure to make such service, the appeal may be dismissed, upon his motion, for want of jurisdiction to entertain it. (Estate of Bell, 539.)
26. **SALE UNDER WILL—QUIETING TITLE—CROSS-COMPLAINT—ACCOUNTING—RECEIVER.**—In an action to quiet title against the executors and heirs of a deceased person brought by a successor in interest of a purchaser who received possession under a sale of real estate and deed thereof made by the executors, pursuant to a power in the will to sell and convey without any order of court, the executors cannot, while their disputed title and right of possession are undetermined, maintain a cross-complaint in equity against the plaintiff and the purchaser, for an accounting of the rents and profits, and for the appointment of a receiver. (Bennallack v. Richards, 427.)
27. **VALIDITY OF SALE—DUTY OF EXECUTORS TO REPORT FOR CONFIRMATION.**—The executors having made a valid contract of sale under the will, so far as they were able to bind themselves, were in duty bound to report it to the court for confirmation, which may be done at any time after the sale; and they cannot attack the validity of the sale, unless, after report thereof, the court refuses to confirm it. (Id.)
28. **ESTOPPEL OF EXECUTORS.**—The executors, having placed the purchaser in possession under the sale and deed made by them, and permitted him to make large improvements thereon, cannot, while refusing to report the sale to the court for confirmation, invoke the aid of a court of equity to compel an accounting of rents and profits or to place the property in the hands of a receiver. (Id.)
29. **SALE OF REALTY FOR BENEFIT OF HEIRS—VESTED RIGHTS—CONSTITUTIONAL LAW.**—Upon the death of the executor, the heirs become at once vested with the full property in his real estate, subject only to liens or burdens then existing or created by statutes then in force; and the legislature has no constitutional power by a subse-

ESTATES OF DECEASED PERSONS (Continued).

quent enactment, to interfere with the vested rights of the heirs to dispose of their own property, by authorizing a sale of the realty to be made by an executor or administrator solely for the benefit of the heirs. (*Estate of Packer*, 396.)

30. **WILL—DECREE OF DISTRIBUTION TO WIDOW—EXECUTION SALE OF SON'S INTEREST—VOID TITLE.**—A decree of distribution of the estate of a deceased person, disturbing the whole of the residue of the estate in fee to the widow, unappealed from, is conclusive upon the question that upon his death she was the owner of the whole of his estate; and the sale under execution of the interest of a son under a will purporting to give a life estate to the widow while remaining such, and the residue to his lawful heirs at her death, and the deed thereof to the purchaser at such sale, pending administration, conveyed no title to the purchaser. (*McKenzie v. Budd*, 600.)
31. **DISTRIBUTION OF ESTATE OF WIDOW—DEED OF SON—AFTER-ACQUIRED TITLE.**—The deed of the son pending the administration of his father's estate, of his interest therein, not purporting to convey title in fee will not carry an after-acquired title distributed to the son under a decree of distribution of the estate of his mother who, as widow, was the sole distributee in fee of the father's estate. (*Id.*)
32. **DISTRIBUTION—MORTGAGEE OF DEVISEE.**—The distribution of the estate of a deceased person cannot be made to the mortgagee of an heir or devisee, or to an assignee as security, who is not a grantee of the heir or devisee. The decree must name the persons entitled under the will, or by succession, or their grantees. (*Estate of Crooks*, 459.)
33. **RIGHT OF MORTGAGEE TO BE HEARD—INTERVENTION—PLEADING.**—The mortgagee has a right to be heard where his interests are affected by the decree of distribution; but no intervention should be allowed on his part, unless sustained by some pleading or statement as to the grounds on which he claims the right to be heard. (*Id.*)
34. **APPEAL BY MORTGAGEE—AGGRIEVED PARTY—INSUFFICIENT RECORD—DISMISSAL.**—An appeal by the mortgagee from the decree of distribution, the record upon which merely shows an offer of the mortgage in evidence, unaccompanied by a pleading or statement of facts, or by any showing that the mortgage debt was not paid, and does not show that the mortgagee is an aggrieved party, must be dismissed. (*Id.*)
35. **DISTRIBUTION—NOTICE OF HEARING—JURISDICTION.**—The statute does not require ten days' notice of the hearing of the final account and petition of an administrator for the distribution of the estate but allows the court to direct what notice shall be given. Where the hearing was fixed at such a date that a ten days' posting was impossible, and the notice was posted every day prior to the hear-

ESTATES OF DECEASED PERSONS (Continued).

ing, the court had jurisdiction at the date fixed, to settle the account and render the decree of distribution. (*Asher v. Yorba*, 513.)

36. **OPENING OF STREET—AWARD OF DAMAGES TO ESTATE OF DECEDENT—VOID DEED OF ADMINISTRATOR.**—Upon the opening of a street by a city, and the award of damages therefor to the estate of a deceased person, a deed to the city by the administrator of the land of the estate taken by the city for the street, executed without an order of court authorizing it, is void. (*McKeeby v. City of Los Angeles*, 639.)
37. **USE OF DAMAGES FOR BENEFIT OF ESTATE—CONSENT OF HEIR—ACTION BY GRANTEE.**—Where the damages awarded to the estate were paid to the administrator and used for the benefit of the estate, which was settled with the full consent of the sole heir, after knowledge of all the facts, his grantee, with like knowledge, cannot maintain an action to recover the damages a second time from the city. (*Id.*)
38. **ACTION FOR DAMAGES—TITLE NOT INVOLVED.**—In an action by the grantee of an heir to recover damages for the taking of land of the estate by the city, under a void deed of the administrator, the title to the land, or the right of the city to retain possession of it as against the heir, is not involved. (*Id.*)
39. **POSSESSION AND PAYMENT BY CITY UNDER MISTAKE OF LAW—TRESPASS—DUTY OF ADMINISTRATOR TO COLLECT DAMAGES.**—The taking of possession of the street by the city and the payment of the damages, under a mistake of law as to the unauthorized deed of the administrator, has no other effect upon the claim for damages than if the city had taken possession by trespass, without the knowledge or consent of the administrator; and the claim for damages being an asset of the estate it was the duty of the administrator to collect the damages for its benefit. (*Id.*)
40. **STATUTES AS TO SALES OF LAND INAPPLICABLE.**—The statutes relating to sales of land by an administrator, compliance with which is essential to a valid sale, have no application to claims for damages accruing to the estate by reason of acts of trespass upon the land. (*Id.*)
41. **EFFECT OF DISTRIBUTION TO HEIR.**—The heir having consented to the settlement of the estate with the claim for damages included therein by the administrator to his knowledge for the benefit of the estate, took the estate on distribution freed from any claim against the city on account of the damage to the land taken for the street; and his grantee stands in his shoes in relation thereto. (*Id.*)
42. **ACTION UPON REJECTED NOTE—EVIDENCE—NONPAYMENT—PRIMA FACIE CASE—BURDEN OF PROOF.**—In an action against the administrator of a deceased person upon a rejected note a *prima facie* case of nonpayment of the note is made by the introduction of the note in evidence with the indorsements thereon, and proof of the signa-

ESTATE OF DECEASED PERSONS (Continued).

ture of the decedent thereto, and of the due presentation of the claim and its rejection; and the burden of proof was thereby cast upon the defendant to prove by competent evidence that the note had been paid; or to raise a legal presumption of payment sufficient to rebut the *prima facie* case made by the plaintiff. (Griffith v. Lewin, 618.)

43. **PRIOR AND SUBSEQUENT NOTES SECURED BY MORTGAGE—PRESUMPTIONS.**—Mere proof that a note secured by mortgage had been executed by the deceased prior to the note in suit and that a subsequent note and mortgage had been executed about a year and a half thereafter, for about the amount then due on the old mortgage and the note in suit, without any evidence that the new note and mortgage was in payment of the old, or as to the consideration thereof, or any evidence that either of the mortgages had any connection with the note in suit, cannot raise any presumption of payment of the note sued upon; but it must be presumed that if the note had been paid, it would have been delivered up and it being found at the death of the decedent in possession of the plaintiff, it must be presumed that it had not been paid by the decedent. (Id.)
44. **SUBSEQUENT PAYMENTS BY DECEASED.**—The note in suit having been indorsed with numerous payments in the handwriting of the deceased subsequently to the execution of the last mortgage, it cannot be presumed that the note was included in the last mortgage and settled thereby in the ordinary course of business. (Id.)
45. **RECEIPTS FOR MONEY NOT INDORSED.**—Receipts given to the plaintiff by the deceased for money not indorsed on the note, should be such in their contents as to raise a presumption that the money included therein was money paid on the note. (Id.)

See Homestead, 2, 3; Vendor's Lien, 3, 6, 7.

ESTOPPEL. See Boundaries, 3; Corporations, 5; Estates of Deceased Persons, 16, 24, 28; Guardian and Ward, 2; Mutual Benefit Association, 5; Practice, 1.

EVIDENCE.

1. **ACTION UPON NOTE—CONSIDERATION—EVIDENCE—DECLARATIONS OF PLAINTIFF—CONDUCT OF DEFENDANT.**—In an action upon a note, the consideration of which was assailed by one of the makers, evidence of the declarations of the plaintiff, made in the presence and hearing of both makers of the note, while counting out the money, that the plaintiff was loaning the money to them, and of the conduct of the defendant assailing the note, in then silently taking the money and walking away with it, is admissible in favor of the plaintiff. (Tibbet v. Tom Sue, 544.)
2. **CONFIDENTIAL COMMUNICATION—TIME OF STATEMENT TO ATTORNEY—HARMLESS EVIDENCE.**—Where the defendant had testified that he

EVIDENCE (Continued).

signed the note several months after its date, under the representation that it was a receipt for five dollars, and that he did not tell his attorney about it when first sued, a question as to when he did tell his attorney is not objectionable as asking for a confidential communication, and an answer thereto that he told his lawyer about it when he employed him, cannot be to the injury of the defendant. (Id.)

3. **VALUE OF EXPERIMENTAL EVIDENCE.**—Experimental evidence in corroboration or disproof depends for its value upon the fact that the experiment was made when the conditions affecting the result were substantially identical; but this identity need not extend to nor be shown to exist, as to conditions which have had no casual operation upon the result. (County of Sonoma v. Stofen, 32.)
4. **CROSS-EXAMINATION—DISCRETION—APPEAL.**—The extent to which the cross-examination of a witness shall be carried is, in some degree, a matter of discretion in the trial court; and its ruling will not be disturbed upon appeal if no abuse of discretion appears. (Grimbley v. Harrold, 24.)
5. **DEPOSITION—LEADING QUESTIONS—WAIVER OF OBJECTION.**—Where both parties were present at the taking of a deposition, the objection that questions were leading must be taken at the time of the interrogatory, and if no objection was then made to the form of the interrogatory, it cannot be urged at the trial. (Kyle v. Craig, 107.)
6. **POWER OF NOTARY TO EMPLOY SHORTHAND REPORTER—TRANSCRIPT OF TESTIMONY—CERTIFICATE.**—The notary taking a deposition may either appoint a clerk or a shorthand reporter to take down the testimony; and the fact that such reporter was not appointed by the court and that his transcript of the testimony into longhand was objected to by defendant's counsel, is immaterial, if the certificate of the notary states that the transcription into longhand was by the notary carefully read to the witness, and, being by him first corrected, was subscribed by the witness in the presence of the notary. (Id.)
7. **EVIDENCE—REPETITION OF EXAMINATION OF WITNESS.**—It is not prejudicial error for the court to disallow questions asked of a witness upon a third cross-examination, which were merely in repetition of questions previously asked of the witness, and answered by him. (Casey v. Leggett, 664.)
8. **LEADING QUESTIONS—DISCRETION.**—It is in the discretion of the trial court to permit a party to ask leading and suggestive questions of his witness, and a case will not be reversed on that ground, unless there is manifest abuse of discretion. (Id.)

See Alimony, 4; Boundaries, 3; Contract, 5-7; Criminal Law, 9, 10, 23, 30; Dedication, 3, 4, 10, 14, 15; Ejectment, 4; Gift, 3-5; Insolvency, 12; Insurance, 9, 10; Mutual Benefit Associa-

EVIDENCE (Continued).

tions, 6; Negligence, 1, 7, 9, 11, 22; New Trial, 4, 5, 15-18, 28-30; Office and Officers, 10-13; Survey, 3, 4.

EXECUTION. See Alimony, 2, 3 Appeal, 7, 8.

EXECUTORS AND ADMINISTRATORS. See Estates of Deceased Persons.

FINDINGS.

1. **CONVERSION OF PERSONAL PROPERTY—DAMAGES—NECESSARY IMPLICATION.**—In an action for damages for the conversion of personal property, findings in favor of plaintiff's ownership and possession, and that the defendant sheriff took the property and sold the same as alleged in the complaint, that it was of the value of seven hundred dollars, and that by virtue of the levy and sale said property was entirely lost to the plaintiff, followed by a conclusion of law that plaintiff is entitled to recover of the defendant the said sum of seven hundred dollars, with interest though informally drawn, necessarily imply that plaintiff was thereby damaged in the amount of the value of the property, and are sufficient to support the judgment without an express finding to that effect. (*McCray v. Burr*, 636.)
2. **FINDING OF PROBATIVE FACTS.**—Where probative facts are found from which the court can declare that the ultimate facts necessarily result the finding is sufficient. (*Id.*)
3. **DEMAND UPON SHERIFF—OWNERSHIP OF PROPERTY—CAUSE OF ACTION.**—The demand upon the sheriff is no part of the cause of action for conversion of the property, but is a mere statutory requirement for the benefit of the sheriff; and it is not necessary that the findings should specifically show that plaintiff was the owner of and entitled to the property at the time of such demand. (*Id.*)
4. **IMPROPER FINDINGS—MOTION TO STRIKE OUT.**—The court cannot properly make findings of fact and conclusions of law, unless issues are joined, and a trial thereof is had; and they have no proper place in an action to foreclose a mortgage, in which there is no appearance of the defendant, and, if made, should be stricken out upon motion. (*Waller v. Weston*, 201.)

See Appeal, 10; Claim and Delivery; Community Property, 4, 5; Corporations, 11; Dedication, 6, 7; Deed, 1, 2; Fraud, 1, 2, 4, 6, 11; Injunction, 4; Insolvency, 7, 15; Landlord and Tenant, 1; Mechanics' Liens, 19; Practice, 7; Quietening Title.

FORCIBLE ENTRY AND DETAINER.

1. **DEFECTIVE COMPLAINT—ACTUAL POSSESSION OF PLAINTIFF.**—In an action for forcible entry and detainer the complaint must show that the plaintiff was in actual possession of the property, as distinguished from the constructive possession thereof, when it was invaded by the defendant; and if it merely alleges that plaintiff was

FORCIBLE ENTRY AND DETAINER (Continued).

in the peaceable and undisturbed possession, it is defective upon special demurrer for uncertainty if not upon general demurrer. (*Knowles v. Crocker Estate Company*, 264.)

2. **SPECIFICATION IN DEMURRER FOR UNCERTAINTY.**—The specification in a special demurrer to such complaint for uncertainty, in that it could not be ascertained therefrom "what was the character of the alleged possession of plaintiff of the property described," though not very clear, is sufficient to put the plaintiff upon notice that the complaint is objected to for not specifically alleging actual possession. (*Id.*)

FORGERY. See Criminal Law, 7, 8.

FRAUD.

1. **FRAUDULENT CONVEYANCE—FINDINGS—CONSIDERATION—SUFFICIENCY OF EVIDENCE—REVIEW UPON APPEAL.**—Where a conveyance by an insolvent debtor to his brother, antedating an attachment and execution sale of the interest of the debtor, was assailed as fraudulent by the execution purchaser, a finding that the conveyance was executed for a valuable consideration in payment of large indebtedness of the debtor to his brother, is sufficiently supported by their testimony to such consideration, if not contradicted or impeached otherwise than by its own weakness, though it may seem in some respects inherently improbable to the appellate court, which cannot substitute its opinion upon the weight of testimony for that of the trial court sitting as a jury to try the case. (*Casey v. Leggett*, 664.)
2. **DELIVERY OF DEED TO ATTORNEY OF GRANTEE.**—A finding that the deed was delivered to the brother as grantee is sufficiently supported by testimony that it was drafted by his attorney at his request and forwarded to the grantor for execution, and was returned to the attorney and held by him for the grantee after its execution. (*Id.*)
3. **PRESUMPTION OF TITLE—BURDEN OF PROOF AS TO FRAUD.**—The deed having been executed for a valuable consideration and delivered to the grantee the law presumes that the title was rightfully acquired by him; and the burden of proof is upon the execution purchaser to show that it was conveyed with fraudulent intent on the part of the grantor, and that the grantee purchased with knowledge of such fraudulent intent, or under such circumstances as to put him upon inquiry as to the fraud of the grantor and was not taken by him in good faith. (*Id.*)
4. **GOOD FAITH OF GRANTEE—SUPPORT OF FINDING—ABSENCE OF PROOF.** A finding in favor of the good faith of the grantee as a purchaser for value without notice of fraud on the part of the grantor, is supported by the absence of proof of facts and circumstances putting him on inquiry as to such fraud. (*Id.*)

FRAUD (Continued).

5. **CIRCUMSTANTIAL PROOF OF FRAUD—SUSPICION INSUFFICIENT.**—Fraud may be proved by circumstantial evidence, but evidence of the facts and circumstances from which fraud may be inferred must amount to proof of fraud; and to create a mere suspicion thereof is not sufficient to overcome the presumption of law in favor of the fair dealing of the parties. (Id.)
6. **IMMATERIAL FINDING—INTENT OF GRANTOR.**—Where the court finds that the grantee was a bona fide purchaser for value without notice of any fraud on the part of the grantor, a finding as to the intent of the grantor in making the conveyance is immaterial. (Id.)
7. **ISSUE AS TO CONSIDERATION—CONJUNCTIVE DENIAL—TRIAL OF ISSUE—OBJECTION UPON APPEAL.**—The objection that no issue was raised upon an averment as to want of consideration for the deed in controversy, by reason of a conjunctive denial in an answer, cannot be urged for the first time upon appeal, where the case was tried in the superior court upon the theory that the denial was sufficient to raise an issue as to the consideration, and the answer might have been amended to meet the objection if raised in the superior court. (Id.)
8. **CONVEYANCE BY BONA FIDE PURCHASER—PROTECTION OF GRANTEE.**—A conveyance by a bona fide purchaser without notice of the fraud of his grantor passes a perfect title to his grantee, as against an execution purchaser claiming under the original grantor, and it is immaterial whether any consideration was paid therefor, or whether the conveyance was intended as a mortgage as between the parties, or whether the grantee was a bona fide purchaser, or had or had not notice of the fraud of the original grantor. (Id.)
9. **LETTER FROM STRANGER—ADVICE TO INSOLVENT TO CONVEY TO WRITER.**—A letter from a stranger addressed to the insolvent debtor, and advising him to make a conveyance to the writer to prevent a threatened attachment, which was not acted upon by the insolvent, nor consented to by any of the parties or their privies is inadmissible in evidence. (Id.)
10. **EVIDENCE OF CONSIDERATION—BORROWING OF MONEY GIVEN—PAYMENT OF DEBT BY DEED.**—Upon the issue as to the consideration of the conveyance by the insolvent to his brother, evidence is relevant and admissible to show that at a time when the debtor was not insolvent he gave two thousand dollars to his brother from the proceeds of land deeded to him by his father, and that the money thus paid to his brother was afterward borrowed by him, and that the payment of the debt for such borrowed money was the consideration for the deed. He had a right, then, to make such gift; and the payment of the indebtedness to his brother for the borrowed money was a consideration sufficient to support the deed. (Id.)

FRAUD (Continued).

11. **EXCHANGE OF LAND FOR FOUNDRY STOCK—RESCISSION—FINDINGS—RELIANCE UPON FALSE REPRESENTATIONS.**—In an action to rescind an exchange of land for foundry stock, fraud justifying the rescission was established by findings that plaintiffs were induced to make the exchange solely by reliance upon materially false and fraudulent representations of fact by the defendants as to the solvency, profits, and assets of the corporation owning the foundry, and that the value of the stock could have been approximately ascertained only by a thorough investigation by experts of the value of the assets, property, books, and business of the corporation and that the plaintiffs were ignorant of the falsity of the representations, and acted upon them as true. (*Dow v. Swain*, 674.)
12. **ABSENCE OF CONFIDENTIAL RELATIONS—POSSIBILITY OF INVESTIGATION—JUDGMENT NOT SUPPORTED—REVERSAL UPON APPEAL.**—Further findings that there was no relation of trust or confidence between the parties, that plaintiffs were not fraudulently induced to forbear inquiry into the truth of the representations, and that “they might have ascertained their falsity by making the necessary investigations and employing the proper means to that end,” cannot overcome the effect of the other findings, or sustain a judgment for the defendants upon the entire findings; and judgment for the plaintiff upon the findings will be ordered upon appeal. (*Id.*)
13. **NEGLECT OF EXAMINATION—CONCLUSION OF LAW—REASON FOR DECISION.**—A finding placed in the conclusions of law “that by reason of their neglect and failure to properly examine the property which they took in exchange for their property, and to investigate and ascertain its value, equity will not grant relief to the plaintiffs,” is not a misplaced finding of fact, nor properly a conclusion of law, but is in its nature the statement of a reason for decision. (*Id.*)
14. **RIGHT TO RELY UPON REPRESENTATIONS—INEQUALITY OF KNOWLEDGE—PRESUMPTION.**—When a representation is made concerning facts of which the party making it has or is supposed to have knowledge, and the other party has no such advantage, and has not investigated for himself or been afforded the means of investigation, and begun to make inquiries, and the representation is not as to generalities the knowledge of which is equally within the reach of both parties, it will be presumed that the party to whom the representations were made relied upon them, and he is justified in doing so. (*Id.*)
15. **IMPERFECT EXAMINATION BY BUYER—FAULT OF SELLER.**—When the seller knows the facts and the buyer is ignorant, and to the knowledge of the seller the buyer relies upon the false representations, equity will not refuse relief because an imperfect examination was made by the buyer because of the false representations, and especial-

FRAUD (Continued).

ly if means were used by the seller to prevent a perfect examination by the buyer. (Id.)

16. **POSITIVE ASSERTIONS WITHOUT WARRANT.**—One who makes positive assertions without warrant cannot excuse himself by saying that the other party need not have relied upon them; but he must show that his representations were not in fact relied upon. (Id.)

See Alimony; Corporations, 7, 10-12; Insolvency, 15, 16; Jury and Jurors, 1; New Trial, 14.

GIFT.

1. **SUFFICIENCY OF CAUSE OF ACTION—DONATION IN VIEW OF DEATH—RECORD OF UNDELIVERED DEED—REFUSAL OF RETRANSFER.**—A complaint showing that the plaintiff, in expectation of immediate death, assigned to the defendant, who was his trusted sister, certain savings bank deposits, and further executed and acknowledged a deed of certain real estate to the defendant, which was never delivered; that the assignment and deed were made with the understanding that, after plaintiff's death, the property should be disposed of by the defendant according to certain instructions given by the plaintiff; that there was no consideration for the transfer; that the defendant, without authority or knowledge of the plaintiff, obtained possession of the deed, and recorded it; and that, upon the recovery of the plaintiff, defendant refused to retransfer the real or personal property to plaintiff upon demand therefor, and claimed to own the entire property, states a cause of action to enforce a trust, both as to the real and as to the personal property. (Kyle v. Craig, 107.)
2. **AMBIGUITY—FAILURE TO SET OUT INSTRUCTIONS.**—The complaint is not demurrable for ambiguity in failure to set out the instructions which were given in view of death, to be carried out after the death of the plaintiff. The instructions were wholly immaterial, in view of the fact that the plaintiff did not die, but lived to reclaim the property. (Id.)
3. **EVIDENCE—DANGER OF DEATH OF PLAINTIFF—LEADING QUESTIONS—DISCRETION.**—The allowance of leading questions to the physician who attended the plaintiff during his illness, as to the danger of his death at the date when the deposits were transferred and the deed executed, was in the discretion of the trial court; and a judgment for the plaintiff will not be reversed upon that ground, there being no manifest abuse of discretion, and no error in regard to a material matter affecting the substantial rights of the parties. (Id.)
4. **RES GESTAE—INTERVIEW WITH BUSINESS MANAGER.**—Evidence is admissible as part of the *res gestae*, to show that the plaintiff, when ill and not expected to live, sent for his business manager, and in-

GIFT (Continued).

interviewed him, stating that he wished to make a will in favor of his sister, the defendant, and subsequently stated that he had concluded to make a deed, and informed the manager of what he wanted his sister to do with the property in case he should die. (Id.)

5. **MOTIVES AND INTENTIONS OF PLAINTIFF—DECLARATIONS—TESTIMONY OF PLAINTIFF.**—The issue being as to whether the alleged transfers were made without consideration in expectation of immediate death, plaintiff's belief that death was impending, and his motives and intentions in making the transfers, were material to the issue and his declarations then made, showing his belief, motives, and intentions, and his own testimony as to what his belief, motives, and intentions then were, are competent evidence. (Id.)

See *Estates of Deceased Persons*, 15.

GRANTOR AND GRANTEE. See Deed; Vendor and Vendee.

GUARANTY.

1. **LEASE—EVICTION FOR NONPAYMENT OF RENT—LIQUIDATED DAMAGES—VOID CLAUSE.**—Under a provision in a lease for five years that, upon failure of the lessee to pay the stipulated rent, he shall vacate the premises upon receiving thirty days' notice from the lessor, it is not difficult or impracticable to fix the amount of damage resulting to the lessor, and an additional clause providing that the lessee, in such case, shall pay to the lessor "the sum of one thousand dollars, as settled and liquidated damages," is void, under sections 1670 and 1671 of the Civil Code. (*Jack v. Sinsheimer*, 563.)
2. **GUARANTY OF VOID PENALTY—LIABILITY OF GUARANTOR.**—A guarantor is never implicated beyond the strict terms of his contract; and a guaranty which by its terms purports to secure the payment of a penalty of one thousand dollars which by the lease was fixed as liquidated damages, in case the lessee should be evicted from the premises for nonpayment of rent, or should voluntarily vacate the same, is void on account of the invalidity of the penalty, and cannot subject the grantor to any liability for rent, or for any actual damage for which the lessee is liable, without covenant or guaranty. (Id.)
3. **VOID MORTGAGE TO SECURE GUARANTOR—QUIETING TITLE.**—A mortgage made by the lessee to secure the guarantor against all cost, damages and expenses accruing to the mortgage by reason of the guaranty of the void penalty contained in the lease is void, and no defense to an action to quiet title by the successor in interest of the mortgagor. (Id.)
4. **INSUFFICIENT ANSWER—LIABILITY OF GUARANTOR NOT SHOWN.**—An answer by such mortgagee in the action to quiet title, which does not aver that by reason of the eviction of the lessee the lessor suf-

GUARANTY (Continued).

ferred any damage, and which does not show that the lessee was evicted or voluntarily vacated the premises, during the term of the lease, is to be construed most strongly against the pleader, and does not disclose any liability of the guarantor, within the terms of his contract, or show that the mortgage of the lessee to the guarantor constitutes any lien upon the mortgaged premises. (Id.)

5. **BANKS—LETTER OF CREDIT AND GUARANTY—NOTICE.**—A written instrument requesting a bank to give continued credit to a third party in a specified amount and continually guaranteeing the payment of the original and future credits, and the continuance or renewal of liability therefor, to the extent of such specified amount, in proportionate sums by the subscribers, is both a letter of credit within sections 2858 and 2865 of the Civil Code, and an absolute guaranty within section 2795 of that code; and the subscribers are not entitled to notice of the credits and liabilities thereafter given or incurred, nor to notice of the acceptance of the guaranty. (London and San Francisco Bank Limited, v. Parrott, 472.)
6. **CONSTRUCTION OF CODE—COMMUNICATION OF CONSENT—ABSOLUTE GUARANTY—GENERAL AND SPECIFIC PROVISIONS—CONFLICT.**—The general provisions of section 1565 of the Civil Code, in the title on contracts, requiring the consent of parties to a contract to be "communicated by each to the other," have no application to the special contract of absolute guaranty to another person of the debt or default of a third person, provided for in the separate title upon guaranty; but the conflicting provision of section 2975 in the latter title, dispensing with notice of the acceptance of an absolute guaranty, must control upon that subject. (Id.)
7. **LIABILITY OF GRANTOR—CONSTRUCTION OF GUARANTY.**—The rule that a guarantor is entitled to stand upon the strict terms of his contract, imports merely that his liability is not to be extended by implication beyond its terms as ascertained by the same rules of construction which apply to other written instruments. (Id.)
8. **REASONABLE INTERPRETATION—AMBIGUITY OF TERMS.**—The language used by the guarantor is to receive a fair and reasonable interpretation to effect the objects and purpose of the guaranty; and if it is fairly susceptible of two interpretations, either of which is within the spirit of the guaranty, the guarantor cannot say the guarantee was not justified in acting upon either, or that he should have acted upon one rather than the other. (Id.)
9. **ACCEPTANCE OF NOTE BY BANK—GUARANTORS NOT DISCHARGED.**—The acceptance by the bank of a note for the amount of an existing credit guaranteed, which did not pay the debt, or alter the relation of debtor and creditor, or extend the time of payment, but was payable immediately when executed, and was within the terms of

GUARANTY (Continued).

the guaranty which, fairly interpreted, were broad enough to embrace any form of credit, or future liability, or continuance or renewal of liability from the debtor to the bank, did not operate to discharge the guarantors. (Id.)

10. **CONSTRUCTION OF AGREED CASE—"FURTHER CREDIT."**—An agreed case stating that after the date of the execution of the note and the crediting of the amount thereof against the overdraft, all deposits made by its maker were applied to the payment of checks drawn thereupon, but that, after that date, "no further credit" was asked or given, is to be construed as meaning that no additional credit for overdrafts was asked or given, and not as importing that the liability for credit previously given ceased from that date. (Id.)
11. **PERMISSION TO CHECK AGAINST DEPOSITS—LIABILITIES OF GUARANTORS.**—The permission of the bank to the maker of the note to draw checks against deposits subsequently made, which were not directed to be applied as payment upon the note, did not affect the liability of the guarantors for the amount of the credit evidenced by the note. (Id.)
12. **CREDIT GIVEN TO CORPORATION—LIABILITY OF GUARANTORS AS STOCKHOLDERS.**—Where the guarantors were stockholders in a corporation whose indebtedness to the bank to a specified amount, was guaranteed by them, and they did not in the guaranty limit their liability as stockholders of the corporation, the bank may not only recover against them upon the guaranty, but also upon their liability as stockholders for their proportionate share of the debt of the corporation to the bank, not exceeding in all the amount of the corporate liability. (Id.)

GUARDIAN AND WARD.

1. **DEPOSIT OF WARDS' FUNDS—TRUST—SET-OFF—DEBT OF GUARDIAN.**
One who has received on deposit moneys belonging to minors from their guardian, with whom he has relations of personal trust and confidence, and with knowledge of their origin and character as the trust funds of the minors, is the trustee of the minors in relation thereto, and cannot offset or charge against them any individual indebtedness of the guardian to him. (*Montgomery v. Rauer*, 227.)
2. **RECEIPT AND RELEASE BY GUARDIAN—ESTOPPEL—PLEADING—RIGHT OF WARDS TO ATTACK SETTLEMENT.**—Where the guardian gave to the depositary a receipt in full of the moneys of the wards, and a release of all demands, the depositary cannot rely upon them as an estoppel against the wards, in an action by them to recover the moneys on deposit without pleading the estoppel, and where it appears that the settlement was not fair and the signature of the guardian was obtained through mistake, misrepresentation and

GUARDIAN AND WARD (Continued).

fraud, and that fifteen hundred dollars of the moneys of the minors still remained in the hands of the depositary, it is the right of the wards to go behind the settlement and show the facts. (Id.)

3. **ELECTION OF WARDS—STATUTES REQUIRING CONSENT OF COURT.**—Such release and receipt having been improperly obtained by the depositary from the guardian, the wards have an election either to pursue the guardian and his sureties, or the person with whom the settlement was made; and this is their right, independent of any statute requiring a guardian to obtain the consent of the court to such a settlement. (Id.)
4. **BURDEN OF PROOF.**—Where the wards took upon themselves the burden of proving the unfairness and fraudulent character of the settlement induced by the depositary, and successfully carried it, it is immaterial whether the burden of proof is properly upon them to impeach the settlement, or whether the duty of showing the fairness of the settlement is upon the depositary. (Id.)
5. **PLEADING—AVOIDANCE OF RELEASE FOR FRAUD—ANTICIPATION OF DEFENSE—REBUTTAL.**—The wards in an action against the depositary were not bound to anticipate the defense of a release and discharge by the guardian, or to plead an avoidance of it in their complaint on the ground of fraud. If the release and discharge had been pleaded in bar of the action, the plaintiff could have avoided it in rebuttal by proof of fraud, without special averment, and may rebut it by like proof, when offered in evidence by the defendant, without being pleaded. (Id.)
6. **APPOINTMENT OF GUARDIAN—NOTICE TO RELATIVES—POSTING—DISCRETION OF COURT.**—Upon the appointment of the guardian of the estate of a minor, the court has discretion to determine the kind and character of the notice to be given to the relatives of the minor residing in the county, and may order such notice to be given by posting, without requiring personal service of citation upon them. (Asher v. Yorba, 513.)
7. **CUSTODY OF MINOR—NOTICE TO GUARDIAN.**—If the one who applies to be appointed guardian of the minor's estate has the custody of the person of the minor, no notice is required to be given to him. (Id.)
8. **SUFFICIENCY OF POSTING—COLLATERAL ATTACK—SALE OF WARD'S ESTATE.**—The fact that the affidavit of the posting of the notices required to be given of the hearing for the appointment of a guardian did not show when the notices were posted, in the absence of proof that the posting was not performed as required, will not sustain a collateral attack upon a judgment decreeing a sale of the ward's estate. (Id.)
9. **PRESUMPTIONS—JURISDICTIONAL FACTS—BURDEN OF PROOF.**—The posting of the notice is presumed to have been done at the proper

GUARDIAN AND WARD (Continued).

time and in the proper manner; and the order of sale is presumed to be valid. The absence of evidence of the jurisdictional facts may be taken as evidence of their existence; and the burden of proof is upon the one assailing their existence, to show the contrary. (Id.)

See Adverse Possession, 2, 3.

HABEAS CORPUS. See Contempt.

HOMESTEAD.

1. **SELECTION REQUIRED—RESIDENCE PRIOR TO CODES—VALIDITY OF MORTGAGE.**—There can be no legal homestead since the enactment of the codes merely from residence, without selection and the record of a declaration thereof, notwithstanding the husband and wife may have resided upon the premises since a date prior to the codes; and a mortgage executed and recorded before a declaration of homestead is filed is a valid charge upon the premises. (Bank of Woodland v. Oberhaus, 320.)

2. **ESTATES OF DECEASED PERSONS—PROBATE HOMESTEAD—TENANCY IN COMMON—RIGHT OF POSSESSION.**—The right of possession of a probate homestead set apart out of the estate of a deceased person to the widow and minor children, the title of one-half of which was to go to the widow, and the other half to the minor children, is in the widow and minor children during their minority; and after their majority their rights as tenants in common are only in the nature of those of remaindermen or reversioners, and the widow is entitled to the possession of the homestead, so long as she desires to maintain it, and until it is legally extinguished; and neither an adult child nor the grantee of such child is entitled to be let into possession with the widow, as a tenant in common. (Moore v. Hoffman, 90.)

3. **PURPOSE OF HOMESTEAD.**—The purpose of a homestead is to secure a home to each and all of those clothed with the homestead right; and the power of one not clothed with such right to enter into possession, as a tenant in common, and interfere with the occupancy and control by the homestead claimants, would be inconsistent with the nature of a homestead and violative of the purpose for which it is created. The homestead is a place of abode for the family, and no act of any member of the family can in any way prejudice the right of the others to occupy it. (Id.)

See Way, 1.

HUSBAND AND WIFE. See Agency; Alimony; Community Property; Deed, 5; Divorce.

INFANTS. See Guardian and Ward.

INJUNCTION.

1. **DEED OF TRUST—SALE—INJUNCTION IMPROPERLY ALLOWED—UNTRUTHFUL ALLEGATIONS—ACTION TO REDEEM.**—A sale under a deed of trust, even if in technical violation of an injunction, will not be disturbed in equity, where it appears that the debtor improperly obtained the injunction by untruthful allegations of fact; and in such case, he cannot maintain an action to redeem the property sold. (Powell v. Bank of Lemoore, 468.)
2. **MAXIMS—RELIEF FORBIDDEN TO VIOLATOR OF EQUITY.**—Under the application of the maxims, that "no man can take advantage of his own wrong," and that "he who comes into a court of equity must come with clean hands," one who has been guilty of conduct in violation of these fundamental principles of equity jurisprudence can have no relief in equity. (Id.)
3. **SALE IN VIOLATION OF INJUNCTION NOT VOID.**—A sale under a deed of trust, in full violation of an injunction, is not void, but merely voidable, and will only be relieved against upon a proper showing by a party entitled to the consideration of a court of equity. (Id.)
4. **FINDINGS IN ACTION TO REDEEM—IMMATERIAL OMISSIONS—ADMISSION OF PLEADINGS—OFFER TO REDEEM AFTER TITLE PASSED.**—The failure to find, in the action to redeem the property sold, that the injunction was issued, is immaterial where that fact was admitted by the pleadings; and the failure to find upon an alleged offer to redeem the property by paying the full amount is immaterial where the complaint shows that such offer was made after the sale and deed of the property, and the court found the ultimate and controlling fact that the title to the land passed by the sale and deed. (Id.)

See Dedication, 13; Ejectment, 3; Municipal Corporations, 10, 11, 13; Water and Water Rights, 7.

INSOLVENCY.

1. **INVOLUNTARY INSOLVENCY—AMENDED PETITION—APPEARANCE OF DEFENDANT—MOTION TO STRIKE OUT—RESERVATION.**—A defendant in involuntary insolvency, who first appears after the amendment of the petition by adding the names of new creditors, upon which no citation was issued, and moves to strike out the amended petition and parts thereof, on grounds not including a want of jurisdiction of his person, makes a general appearance, notwithstanding an express statement in the motion to the contrary, and an express reservation of his "right to be brought into court by the issue of regular process." (In re Clarke, 388.)
2. **NATURE OF APPEARANCE, HOW DETERMINED—CHARACTER OF RELIEF.** The nature of an appearance as being special or general, is determined by the character of the relief asked and not by the expressed intention of the defendant. One who appears and objects to the consideration of a case for want of jurisdiction of his person, ap-

INSOLVENCY (Continued).

pears specially, whether he so states or not. But if he appears and asks for relief which can only be given to a party in a pending cause, the appearance is general, although it may be expressly declared to be special. (Id.)

3. **JURISDICTION OF PERSON OF DEFENDANT—MOTION—DEMURRER—ANSWER.**—Where, upon the first appearance of the defendant in the insolvency proceedings, he asked favors by motion which could only be demanded by a party to the record, and, upon his motion being denied, he demurred to the petition upon nearly all of the statutory grounds, and also filed an answer upon which issues of fact were raised and tried, he submitted himself to the jurisdiction of the court, and cannot complain that he was not properly brought in by citation. (Id.)
4. **FAILURE TO GIVE BOND—ABATEMENT—ADJUDICATION OF INSOLVENCY—WAIVER.**—The failure of the creditors to give bond does not render the insolvency proceedings absolutely void; but it is matter of abatement which must be taken advantage of prior to a trial of issues upon which an adjudication of insolvency is had; and, if not specifically urged prior to such trial and adjudication, it is waived. The objection cannot be urged subsequently to the adjudication. (Id.)
5. **OBJECTION TO FORM OF BOND AND SUFFICIENCY OF SURETIES.**—An objection to the form of the bond filed under the original petition, and to the sufficiency of the sureties thereupon, is a waiver of objection to the lack of a bond. (Id.)
6. **AMENDED PETITION—LACK OF NEW BOND—WAIVER OF OBJECTION.**—Where the petition was amended by adding the names of other creditors, without the filing of a new bond, and a trial was had under the amended petition, without objection to the power of the court to allow the amendment, or calling its attention to the fact that a new bond had not been filed under the amended petition, owing to the apparent belief of the insolvent that the bond given under the first petition would serve under the amended petition, all objection to the lack of a new bond is waived. (Id.)
7. **FORM OF ADJUDICATION—FINDINGS—CONCLUSIONS OF LAW.**—Formal findings of facts and conclusions of law are not necessary upon an adjudication of insolvency and the adjudication is complete in form and substance if the court by order adjudges that the defendant was insolvent on a specified date prior to the filing of the petition, and ever since has been, and still is, insolvent; and the fact that it proceeds unnecessarily to add as a conclusion of law that the defendant was insolvent on that date cannot affect the sufficiency of the adjudication. (Id.)
8. **INCOMPLETE ENTRY IN MINUTES.**—The order of adjudication of insolvency is interlocutory, and should be entered in the minutes; but the fact that it was not entered, or that the entry made by the

INSOLVENCY (Continued).

clerk was incomplete or informal does not render the adjudication invalid, if the order was in fact sufficient in form and substance. (Id.)

9. CITATION TO INSOLVENT TO ANSWER CONCERNING PROPERTY—CONTEMPT—PUNISHMENT.—After the adjudication of insolvency and the ordering of the defendant to file schedules, with which order he failed to comply, the court may cite him to answer concerning his property, and, upon his refusal so to do, may punish him for contempt, by imprisonment until he consents to answer. The addition of imprisonment for one day, and until, et cetera, is immaterial, where the defendant did not avail himself of the privilege of answering during the day. (Id.)
10. PRESENCE OF DEFENDANT.—Where the defendant answered the citation for contempt by challenging the jurisdiction of the court in a written statement, which was taken under advisement and overruled, the defendant cannot object that he was not personally present in court when the contempt was adjudged. (Id.)
11. VOLUNTARY PROCEEDINGS IN INSOLVENCY—DISCHARGE—JURISDICTION OVER INVOLUNTARY PROCEEDING.—The fact that the insolvent, after the adjudication of insolvency in the proceedings by the creditors, instituted voluntary proceedings in insolvency, and obtained a discharge therein, whatever effect such discharge may have as a plea in bar in a proper case, could not operate to deprive the court of jurisdiction over the prior proceedings by the creditors in involuntary insolvency. (Id.)
12. ACTION BY ASSIGNEE IN INSOLVENCY—EVIDENCE OF AUTHORITY.—In an action by an assignee appointed under proceedings in involuntary insolvency against a partnership, to recover property assigned by the firm, to the defendants, in violation of the insolvent act, within one month prior to the filing of the petition by the creditors, a certified copy of the assignment to the assignee is conclusive evidence of the right of the assignee to bring the action. (Riego v. Foster, 178.)
13. COLLATERAL ATTACK UPON CREDITOR'S PETITION.—Where the insolvency proceedings were regular on their face, they cannot be collaterally attacked by the defendants in an action by the assignee, upon the alleged ground that the signers of the petition were not actually creditors of the insolvents in the amount required by the Insolvent Act. (Id.)
14. ORDER STRIKING OUT ANSWER—DEFINITENESS—PRESUMPTION UPON APPEAL.—Where the motion to strike out parts of the answer in such action specifically quoted all the parts of the answer sought to be stricken out, and the court granted the motion as to all those parts of the answer which attack the validity of the insolvency proceedings, and denied it otherwise, the order, though it would be in better form if more fully identifying the part stricken out, is not too indefinite to be sustained, and it will be presumed upon

INSOLVENCY (Continued).

appeal in favor of the judgment that the appellants were not deceived or prejudiced by the form of the order. (Id.)

15. **FINDINGS—CONSISTENCY—TRANSFER OUT OF USUAL COURSE OF BUSINESS—FREEDOM FROM ACTUAL FRAUD.**—A finding, based upon an admission in the pleadings, that the transfer was not made in the usual and ordinary course of business, and that at the time thereof, defendants knew and had reason to believe that the firm was insolvent, and that the transfer was being made with intent to prefer certain creditors, represented by the defendants, and with a view to prevent the property from coming to the assignee in insolvency, et cetera, is not inconsistent with another finding that defendants were free from actual fraud, and believed their conduct to be lawful. (Id.)
16. **ACTUAL FRAUD IMMATERIAL.**—Actual fraud is not an element in the case; and if the provisions of the Insolvent Act are violated, the transfer is void, regardless of any question of honesty and fairness, good faith, or actual fraud. (Id.)
17. **PARTNERSHIP—INSOLVENCY OF MEMBER OF FIRM—DISTRIBUTION OF ASSETS—CONSTRUCTION OF CODE.**—The provisions of section 39 of the Insolvent Act for proceedings in the case of insolvent partnership, and the relative distribution of the firm assets, and of the individual assets of the partners, do not apply to a proceeding in insolvency in the case of an individual member of the firm, where the court has no jurisdiction over the assets of the partnership. In such case, the assets of the insolvent may be distributed *pro rata* to all of the creditors who have proved their claims, including the firm creditors. (In re Straut, 415.)

See Estates of Deceased Persons, 11-13.

INSTRUCTIONS.

1. **EXCEPTIONS TO INSTRUCTIONS—PRESUMPTION UPON APPEAL.**—A general exception to the instructions without specifying any particular instruction, or part thereof, is insufficient; and where the court stated generally that every portion of the charge is deemed excepted to, it will be presumed upon appeal, against error not shown affirmatively, that all of the instructions were given at the request of appellant's counsel, of which appellant cannot complain. (Gray v. Eschen, 1.)
2. **REFUSAL OF REQUESTS.**—The court may properly refuse requested instructions which invade the province of the jury, or may mislead them, or which are covered by instructions given in the charge of the court. *Estrella Vineyard Co. v. Butler*, 232.)
See Criminal Law, 3-6, 13, 16-21; Jury and Jurors, 2; Landlord and Tenant, 5; Negligence, 2-5, 8, 20, 23.

INSURANCE.

1. **FALSE STATEMENT IN APPLICATION—KNOWLEDGE OF FACTS—WAIVER.**
An insurance company issuing a policy with knowledge that state-

INSURANCE (Continued).

ments made in the application are false, waives the right to object thereto. (*Bayley v. Employers' Liability Assurance Corporation*, 345.)

2. **APPLICATION FOR ACCIDENT INSURANCE—OMISSION BY AGENT OF KNOWN FACTS—PREVIOUS COMPENSATION.**—Where an apparently false statement, made in an application for a policy of accident insurance, that the applicant had "never received compensation for any accident except as hereinafter stated," was caused by the omission of the agent who drew it, to state the "names of companies or associations with amount of compensation," provided for in the form of application, and where the agent omitted to request a statement thereof from the applicant, and the facts that he had received previous indemnity for accidents from the same and other companies were known to the officers of the company, at the time of the application, objection to the falsity of the statement is waived, and it cannot vitiate the policy. (*Id.*)
3. **UNKNOWN PAYMENTS BY COMPANY KNOWN TO HAVE PAID INDEMNITY.**—Where the officers of the insuring company knew that a previous large payment of indemnity for an accident had been made to the applicant by another company, the fact that another prior and smaller payment made to him by the same company was unknown to them, cannot affect their waiver of a true statement not requested of the applicant, as to the amount of compensation previously received. (*Id.*)
4. **WAIVER OF COMMUNICATION.**—Neither party to a contract of insurance is bound to communicate information of matters of which the other waives communication, except in answer to inquiries. (*Id.*)
5. **CONSTRUCTION OF APPLICATION AND POLICY—"COMPENSATION"—"INDEMNITY."**—The term "compensation," used in an application for an accident policy, requiring a statement of the amount of "compensation" previously received for accidents is not to be construed in a popular sense, as including "indemnity," where the application and policy used the word "indemnity" with exclusive reference to weekly payments to be made as indemnity during total disability to prosecute business, as the result of an accident, and never with reference to payments to be made for loss of life, limb, or eye. (*Id.*)
6. **CONSTRUCTION AGAINST INSURER.**—Where the language of an application and policy, or of a policy, may be understood in more senses than one, it is to be construed most strongly against the insurer and in favor of the insured. (*Id.*)
7. **FIRE INSURANCE—DELIVERY OF POLICY AFTER FIRE—PRIOR AGREEMENT FOR EFFECTIVE POLICY.**—A fire insurance policy may be delivered after the occurrence of a fire, if it purports to take effect prior to occurrence, and is the memorial of a prior parol contract for such a policy agreed to in its essentials, and which the parties

INSURANCE (Continued).

intended should take effect as stated in the policy. In such case, it seems that the policy may have taken effect without actual delivery to the insured or his agent. (*Crawford v. Transatlantic Fire Insurance Company*, 609.)

8. **ABSENCE OF PRIOR AGREEMENT—NONLIABILITY FOR PREMIUM.**—In the absence of such a prior agreement, as would bind the insurance company and render the insured person liable for the premium, the delivery of the policy after the building had been destroyed by fire, to the knowledge of the parties, could not give any effect to the instrument. (*Id.*)
9. **ACTION UPON POLICY—EVIDENCE—ACTS AND DECLARATIONS OF AGENTS—RES GESTAE.**—In an action upon such policy all of the acts and declarations of the agents of the fire insurance company which might characterize their intent while they were engaged in the business of the insurance, and until the delivery of the policy, are admissible against the insurance company as part of the *res gestae*. (*Id.*)
10. **SUBSEQUENT NARRATIONS—HEARSAY.**—The declarations of the agents of the defendant, made at a time subsequent to the delivery of the policy or when they were not acting for one defendant in any business connected therewith, and which were not part of the *res gestae*, but are mere narration or illustration of their past conduct are incompetent hearsay. (*Id.*)

See *Mutual Benefit Association*; *Negligence*, 15, 23.

INTEREST. See *Mechanic's Lien*, 11; *Tender*.

INTERVENTION. See *Community Property*, 5; *Estates of Deceased Persons*, 33.

JOINT DEBTORS.

JOINT OBLIGATION—RELEASE OF CODEFENDANT.—The release of a codefendant who was a joint obligor with the other defendant does not release the other defendant from his obligation to pay so much of the debt as was not paid by the codefendant released. (*French v. McCarthy*, 508.)

JUDGE. See *Place of Trial*, 1, 2.

JUDGMENT.

1. **JUDGMENT UPON ADMISSIONS OF ANSWER—RELIEF MUST BE WARRANTED BY COMPLAINT.**—In case of a judgment rendered upon an answer admitting all of the averments of the complaint, and presenting no issue, whether it is in effect the same as a judgment by default or not, the relief granted to the plaintiff cannot exceed that which the law awards as the legal conclusion from the facts alleged, or be inconsistent with the case made by the complaint. (*Ellis v. Rademacher*, 556.)

JUDGMENT (Continued).

2. **COMPLAINT FOR SPECIFIC PERFORMANCE—IMPROPER RELIEF.**—Under a complaint for the specific performance of a contract to convey a half interest in a mine in consideration of the building of a mill by plaintiff, and to work the mine upon equal shares, alleging interference by defendant with the performance of the contract by plaintiff, and his ejection of plaintiff from the mine, a judgment directing specific performance by the defendant, and not by the plaintiff, and enjoining the defendant from conveying any part of the mine to anyone other than plaintiff, and from working the mine, without reference to any performance of the contract by the plaintiff, is improper, and grants relief inconsistent with the case made by the complaint. (Id.)
3. **JUDGMENT FOR CO-PLAINTIFF—INSUFFICIENT ALLEGATION.**—A judgment in favor of a co-plaintiff is not authorized or sustained by an allegation that plaintiffs are informed and believe that such co-plaintiff has or claims to have some interest in the mining property. (Id.)
4. **INDEFINITE JUDGMENT—REFERENCE TO EXHIBIT OF CONTRACT.**—A decree enforcing a contract should be definite as to the things to be performed by each of the parties, and as to the acts enjoined; and a decree enjoining a defendant from doing any act whatever which will in any way interfere with the rights of the plaintiff under an exhibit of the contract attached to the complaint, is too uncertain and indefinite to be enforced. (Id.)
5. **ACTION FOR DAMAGES—JOINT JUDGMENT—AMENDMENT—OMISSION OF DEFENDANT NOT APPEARING—PRESUMPTION UPON APPEAL.**—In an action for damages against several defendants, where judgment was rendered jointly against all of the defendants, and the court amended it by striking out the name of a defendant not appearing in the action, it will be presumed upon appeal from the amended judgment, in favor thereof, that the omitted defendant was not served with summons, and that on motion of the plaintiff the action was dismissed as to him, and that the judgment against him was a clerical misprision and a nullity, which was properly stricken out. (Silveira v. Iverson, 266.)
 See Appeal, 2, 3, 5-10; Boundaries, 1, 3; Costs; Elections, 4, 5; Mortgage, 2; Practice, 1-6, 8, 9; Street Assessment; Summons; Tender, 1, 6; Trust Deed, 2, 3; Vendor's Lien, 7, 8.

JURISDICTION. See Divorce, 1, 3; Insolvency, 2, 3; Place of Trial, 2, 4; Public Lands, 1.

JURY AND JURORS.

1. **ACTION TO ANNUL CONTRACTS OF SALE—FRAUD—RECOVERY OF PURCHASE MONEY—EQUITY JURISDICTION—JURY TRIAL.**—In an action by a purchaser under contracts for the sale of lands, to have them annulled on the ground of false representations inducing the pur-

JURY AND JURORS (Continued).

chase, and to recover back the purchase money paid, the court, as a court of equity, has jurisdiction of the main action, and a general jury trial of all the issues cannot be demanded in the action. Where no issue is raised as to the amount of money paid under the contract, and the answer merely denies the false representations, there is no issue upon which a jury trial can be demanded, and the court, upon determining the issues in favor of the plaintiff, may award full relief, to prevent further litigation. (*Mesenburg v. Dunn*, 222.)

2. **ADVISORY VERDICT OF JURY—INSTRUCTIONS NOT SUBJECT TO EXCEPTION.**—In an equitable action for an injunction, the verdict of a jury is merely advisory; and though the court, in its findings of fact, adopts the conclusion of the jury, its instructions to the jury are not the subject of an exception. (*Scheerer v. Goodwin*, 154.)

See Criminal Law, 11, 12; New Trial, 1-10, 24.

LANDLORD AND TENANT.

1. **LEASE—ACTION FOR RENT—RECOUPMENT FOR MISREPRESENTATIONS—EVIDENCE OF DAMAGE—FINDINGS.**—In an action for a balance of unpaid rent upon a lease of a house, where recoupment of damages was claimed on account of misrepresentations as to the capacity of the house which induced the defendants to execute the lease, and the only evidence tending to show damage was the payment of a sum for additional rooms, which sum was remitted from the judgment on motion for new trial, they are not injured by erroneous findings of fact on the question of damages, and cannot claim an additional allowance for the difference in rental value of such a house as it was represented to be, and such as in fact it was, there being no evidence to show such difference beyond the payment made for other rooms. (*Hamilton v. Smith*, 530.)
2. **LEASE FOR YEARS—DUTY OF TENANT AT EXPIRATION OF TERM.**—A tenant in possession under a lease for a fixed term, is a tenant for years, and is in duty bound, at the expiration of his term, to surrender possession without notice of any kind. (*Kuhn v. Smith*, 615.)
3. **LEASE OF AGRICULTURAL LAND.—HOLDING OVER—TENANCY AT WILL—NOTICE TO QUIT EJECTMENT.**—The mere holding over by a tenant under a lease of agricultural lands, after the expiration of the term fixed therein, for a period of six weeks, without consent of the owner, though without previous demand for possession, does not constitute a tenancy at will, or entitle the tenant to any notice to cut off his rights, before the bringing of an action of ejectment against him by the owner. (*Id.*)
4. **GOODS SOLD AND DELIVERED—BLASTED MATERIALS—PROOF OF OWNERSHIP—LEASE—TITLE TO LAND BLASTED.**—In an action of *assumpsit*, for goods sold and delivered, which consisted of blasted materials,

LANDLORD AND TENANT (Continued).

claimed by the plaintiffs to have belonged to them, and to have been taken away by the defendants, when the ownership thereof by plaintiffs was denied, proof thereof devolved upon them; and where they introduced a lease to themselves of premises from which they claimed the materials were taken, the right of the plaintiffs to recover depends upon the ownership by their lessor of the land from which the materials were blasted, and they cannot claim that such ownership was not in issue. (*Gray v. Eschen*, 1.)

5. INSTRUCTIONS—OWNERSHIP OF LAND—BLASTING FROM STREET.—Instructions in such action, based upon testimony that the blasting was done by plaintiff's lessor within the lines of a public street, to the effect that if the jury find that plaintiffs' lessor was not the owner of the land from which the materials were blasted, and had no interest therein, and that plaintiffs' only right to the materials was derived from him, their verdict should be for the defendants, and that, if any of the materials were blasted out of the street without the consent of the city authorities, their verdict should be for the defendants as to all materials which came from the street, are correctly given. (*Id.*)

6. TITLE OF DEFENDANTS TO "WASTE" MATERIALS.—Where it appeared that defendants had bought from plaintiffs' lessor, and paid for all "waste" materials blasted by him on the premises subsequently leased by him to plaintiffs, the title of the defendants to such "waste" materials is superior to that of the plaintiffs; and plaintiffs only took from their lessor what had not before been sold to the defendants. (*Id.*)

LANDS. See Public Lands; State Lands.

LEASE. See Adverse Possession, 3; Guaranty, 1-4; Landlord and Tenant.

MANDAMUS. See Elections, 4; Municipal Corporations, 8; Office and Officers, 4, 5.

MAP. See dedication, 2, 3, 9.

MASTER AND SERVANT. See Negligence, 1-3, 5-7, 12-14.

MEASURE OF DAMAGES. See Damages.

MECHANICS' Liens.

1. NOTICE BY MATERIALMEN—GARNISHMENT—STOPPAGE OF FUTURE PAYMENTS.—A notice given by materialmen to the trustees of an asylum demanding payment of their claims out of the balance remaining due to a contractor who had agreed to furnish materials and perform labor upon a ward building for the asylum, is equivalent to a garnishment of the moneys then payable to the contractor,

MECHANICS' LIENS (Continued).

the effect of which is to be determined by the rights of the contractor as to payments already matured, and also operates as a notice that the payment of any moneys thereafter becoming payable under the terms of the contract, otherwise than to the claimants, would be at the peril of the trustees. (*Newport Wharf and Lumber Company v. Drew*, 585.)

2. **EFFECT OF NOTICE UPON MATURED INSTALMENTS—ASSIGNMENT BY CONTRACTOR.**—If the contractor is still entitled to demand payment of instalments already matured at the time of the notice, payment to him is intercepted by the notice; but, if he has already assigned them to a third party, the notice will be inoperative to prevent their payment to such party. (*Id.*)
3. **AGREEMENT FOR SATISFACTION OF TRUSTEES—ESTIMATES BY SUPERINTENDENT—APPROVAL AND DIRECTION FOR PAYMENT—ASSIGNABILITY OF ESTIMATES.**—Under a contract providing that the work should be done to the satisfaction of the trustees of the asylum, and that ninety per cent of the value of the work and materials should be paid in monthly instalments as the work progresses, upon estimates made by the superintendent of construction, the approval of an estimate by the trustees, and their direction for its payment, without any formal declaration of their satisfaction, vests in the contractor the right to the immediate payment of the monthly instalment of ninety per cent. Such estimates of value are assignable by the contractor prior to their approval; and the subsequent approval thereof, prior to notice from a materialman, inures to the benefit of the assignee. (*Id.*)
4. **PROVISION FOR CONTROLLER'S WARRANTS.**—The maturity and assignability of the monthly instalments, after approval of the estimates of value, and direction for payment, are not affected by a provision in the contract for payment in controller's warrants, nor by the failure to procure such warrants immediately upon the approval of the estimates. (*Id.*)
5. **NOTICE BY MATERIALMAN BEFORE APPROVAL OF ASSIGNED ESTIMATE.** The notice by a materialman of his claim against the contractors given prior to the approval of an assigned estimate, intercepts the payment to the contractors before their right to receive the money has accrued, and any assignment thereof by the contractors prior to maturity of the instalment is ineffective as against the materialman. (*Id.*)
6. **ASSIGNMENT TO BANK—PRESIDENT AS TRUSTEE OF ASYLUM—AUTHENTICATION OF ESTIMATES.**—The fact that the assignment of the estimates was made to a bank as security for money borrowed from the bank, and that its president was chairman of the board of trustees of the asylum for which the work was done, does not disqualify such president from acting as a member of the board of trustees in

MECHANICS' LIENS (Continued).

approving the estimates of the superintendent of construction, or from authenticating the action of the board as its chairman, though the effect of such action is to render the amount immediately payable to the bank. (Id.)

7. **THRESHER'S LIEN—LIMITATION OF ACTION.**—The thresher's lien, given by the act of 1885 (Stats. 1885, p. 109), for work done while a threshing machine is engaged in threshing, is purely statutory, and the right to the same cannot be extended beyond the limits prescribed by the plain language of the law. The lien expires by limitation, unless action is brought to recover the amount of the claim within ten days after the party ceases work. (*Blackburn v. Bell*, 171.)
8. **DEFERRED PAYMENT TO CONTRACTOR—PROVISO AGAINST LIENS—FILING OF CONTRACTOR'S LIEN.**—A provision in a building contract which is framed in compliance with section 1184 of the Code of Civil Procedure, that the last payment of twenty-five per cent of a contract price should become due thirty-five days after the completion and acceptance of the building, "provided said building and premises were free and clear from all liens and incumbrances arising from or created or placed thereon by said contractor," does not preclude the filing of a lien by the contractor before the expiration of the thirty-five days, under section 1187 of that Code. (*Knowles v. Baldwin*, 224.)
9. **GIVING OF CREDIT—EFFECT UPON LIEN.**—The giving of credit for a longer period does not effect the time within which the notice of lien must be filed; but under section 1190 of the Code of Civil Procedure, if credit is given by the terms of the contract, suit may be brought upon the lien within ninety days after the expiration of the credit. (Id.)
10. **GENERAL DEMURRER—RIGHT TO RELIEF.**—Where the complaint for the foreclosure of the lien of the contractor was demurred to generally, the demurrer should be overruled if the complaint entitles the plaintiff to any relief. (Id.)
11. **ALLOWANCE OF INTEREST.**—The contractor, in an action to enforce his lien, is entitled to interest on the respective payments to be made under the contract, from the dates when they became due; and a decree directing interest only as of the date of the commencement of the trial is to the prejudice of the plaintiff, and not of the defendant. (Id.)
12. **DATE OF TRIAL—FINDINGS OF FACT—RECORD UPON APPEAL—MINUTE ORDERS—JUDGMENT-ROLL.**—The recital as to the date of the commencement of the trial in the findings of fact must prevail as against entries of minute orders appearing in the transcript under the certificate of the clerk, which are not part of the judgment roll, and which cannot be considered as part of the record upon appeal from the judgment or noticed for the purpose of contradicting the findings of fact. (Id.)

MECHANICS' LIENS (Continued).

13. **SUBCONTRACT OF ARCHITECT—RECORD—PRESUMPTION.**—A subcontract in favor of the architect with the contractor, which was attached to the original contract for the erection of a building, and recorded with it, must be presumed to have been made with the knowledge of the owner of the building; and, in the absence of fraud or deception, the mere dual position occupied by the architect does not *ipso facto* render either of the contracts void, or preclude the enforcement of liens in favor of persons performing labor and furnishing materials for the subcontractor. (Orlandi v. Gray, 372.)
14. **COMPLETION OF BUILDING—OCCUPATION BY OWNER—SUBSEQUENT WORK—CONSTRUCTION OF CODE.**—The occupation of the building by the owner is conclusive evidence of its completion, within the meaning of section 1187 of the Civil Code, only when it is open, entire and exclusive, and inconsistent with a continuance by the contractor in the completion of his contract, and such as to give notice that the building is accepted in satisfaction of the contract. If the contractor continues the work of construction, or labor is done and materials are furnished, pursuant to the contract, after the occupation by the owner, such occupation is not conclusive evidence of completion, and does not start the statute in motion as to the time when liens should be filed. (Id.)
15. **RETENTION OF MONEY DUE CONTRACTOR—DETERMINATION OF RIGHTS—DEPOSIT IN COURT.**—Under the statute providing for the retention building to a contractor for the construction or repair thereof, in order to pay off and discharge liens filed thereupon, the owner has of twenty-five per cent of the money to be paid by the owner of a the right to retain the money to protect the property from valid liens; but he cannot pass upon their validity except at his own peril. He may protect himself by depositing the money in court, to await its determination of the validity of the liens, and of the rights of the contractor, or of his assignee in insolvency. (Wilson v. Nugent, 280.)
16. **VOLUNTARY PAYMENT BY OWNER—CLAIM OF ASSIGNEE IN INSOLVENCY.**—Where the owner made a voluntary payment of lien claimants so as to consume the whole of the twenty-five per cent reserved payments, acting upon his own judgment of their validity in so doing, after knowledge of a claim made to the whole of the reserved payment by the assignee in insolvency of the contractor, the owner is not protected by such payment, if the liens are in fact invalid; and, in such case, the assignee in insolvency may recover from him the amount of the claim. (Id.)
17. **INVALID NOTICES OF LIEN—TERMS OF CONTRACT NOT TRULY STATED.**—Notice of claims of lien by materialmen which untruly state the terms and conditions of the contract as being "that claimant was to receive the reasonable market value of the materials so furnished,"

MECHANICS' LIENS (Continued).

whereas in fact the materials were furnished in each case to the contractor at a fixed price, are invalid on account of the variance, and create no lien upon the premises. (Id.)

18. **HAULING SLATE FOR ROOF.**—Persons who did not furnish materials to be used on the building, nor perform any labor thereon, but who were merely engaged by the contractor to haul slate to the building and deliver it to the contractor for his use upon the roof, are not within the terms of the lien law, and are not entitled to a lien upon the building for such labor. (Id.)
19. **USE OF MATERIALS—FINDINGS—SUPPORT OF JUDGMENT.**—In order to sustain a judgment in favor of the validity of liens of materialmen, the findings must show that the materials furnished by the lien claimants were furnished to be used, and that they were used in the construction of the building upon which the lien is claimed. (Id.)

MEXICAN GRANT. See Easement; Public Lands, 3.

MINES AND MINING. See Corporations, 7-12; State Lands.

MORTGAGE.

1. **FORECLOSURE OF MORTGAGE—JOINDER OF PARTIES—ENDORSERS OF NOTE.**—In an action for the foreclosure of a mortgage securing the payment of a promissory note which was endorsed before delivery by third parties who waived demand and notice, the endorsers of the note may be properly joined as codefendants. (Hubbard v. University Bank of Los Angeles, 684.)
2. **JUDGMENT FOR DEFICIENCY AGAINST ENDORSER.**—In such action a judgment may be rendered and ordered docketed for the deficiency which may arise after sale of the mortgaged premises, against the endorsers as well as against the makers of the note. (Id.)
3. **ALLOWANCE OF ATTORNEY'S FEE—EXECUTION OF MORTGAGE BY CORPORATION—AUTHORITY FROM DIRECTORS—ADMISSIONS IN PLEADINGS.**—Where the mortgage in suit expressly provided for the allowance of a reasonable attorney's fee, to be fixed by the court, the corporation defendant, in whose name the mortgage was executed, is bound by admissions in the pleadings that the corporation executed the mortgage, and that its execution was authorized by resolution of its directors; and it cannot claim that the resolution did not authorize the allowance of an attorney's fee. (Id.)
4. **CHATTEL MORTGAGES—FORECLOSURE OF SECOND MORTGAGE—VALUE OF PROPERTY—POWER OF COMMISSIONER.**—A commissioner appointed to make sale of chattels under a decree of foreclosure of a second chattel mortgage thereupon, is clothed with executive powers only, and cannot judicially determine that the property is not of sufficient

MORTGAGE (Continued).

value to meet the prior mortgage, nor certify a deficiency without having made sale of the property as directed. (*Redlands Hotel Association v. Richards*, 569.)

5. **RETURN WITHOUT SALE—DEFICIENCY JUDGMENT VACATED—EXECUTION QUASHED.**—The return by the commissioner without sale cannot warrant the docketing of a deficiency judgment; and a judgment so docketed, upon which execution is issued, is properly vacated by the court, and the execution quashed. (*Id.*)
6. **POWER OF COURT—CASE CONSIDERED.**—It seems that under the equitable construction given to the statute in *Toby v. Oregon etc. Co.*, 98 Cal. 490, the court may have the power, upon proper proof that the mortgage was valueless, on account of the insufficiency of the property to pay and discharge the prior mortgage, to find that fact, and direct a deficiency or personal judgment against the defendants without selling the mortgaged property. (*Id.*)
7. **FORECLOSURE OF MORTGAGE—SALE UNDER DECREE—APPEAL—MODIFICATION—EXCESS OF INTEREST—RESTITUTION.**—Where mortgaged property was sold under a decree of foreclosure, prior to an appeal therefrom which was taken one day before the time for redemption expired, without any stay bond, and the judgment was merely modified upon the appeal as to an excess of interest allowed, and affirmed in other respects, the defendant is not entitled to have the sale under the decree set aside, and is only entitled to restitution of the excess of interest. (*Yndart v. Den*, 85.)
8. **DISCRETION AS TO RESTITUTION—SETOFF OF RENTS AND PROFITS.**—The court has discretion in the matter of restitution; and where it appears that the defendant, after the sale, received rents and profits to which the purchaser was entitled, to an amount greater than the excess of interest included in the judgment, the court may, in its discretion, allow such rents and profits as a setoff to such excess. (*Id.*)
See Acknowledgment, 3; Agency; Estates of Deceased Persons, 22; 32-34, 43, 44; Guaranty, 3, 4; Homestead, 1; Place of Trial, 1, 2; Subrogation, 1; Summons, 1; Vendor and Vendee, 6, 10; Way, 1.

MUNICIPAL CORPORATIONS.

1. **ANNEXATION OF TERRITORY TO CITY—CONSTITUTIONAL LAW—SPECIAL LEGISLATION.**—The act of 1889, "to provide for the alteration of the boundaries of, and for the annexation of territory to, incorporated towns and cities, and for the incorporation of such annexed territory in and as part of such municipalities, and for the districting, government, and municipal control of annexed territory," is constitutional, and is not special legislation because conferring upon the electors of any municipality alone the privilege of petitioning the municipal authorities to make the proposed annexation, to the ex-

MUNICIPAL CORPORATIONS (Continued).

clusion of the electors of the annexed territory, the residents of which are fully protected by requiring a majority of the voters thereof to authorize the annexation. (Vernon School District v. Board of Education of City of Los Angeles, 593.)

2. **TITLE OF ACT.**—The title of the act providing for such annexation is broad enough to include a provision that the “annexed territory shall be to all intents and purposes a part of such municipal corporation, except only that no part of such annexed territory shall ever be taxed to pay any portion of any indebtedness or liability of such municipal corporation contracted prior to or existing at the time of such annexation.” (Id.)
3. **ANNEXATION OF PART OF SCHOOL DISTRICT.**—School property forming part of annexed territory belongs to the city to which the territory is annexed, and is under the control of its board of education; and the fact that it formed part of a school district, which still maintains the organization and name of the original school district, is immaterial. (Id.)
4. **DIVISION OF PROPERTY.**—In the absence of statutory provisions governing the ownership of municipal property, or of a school district, upon division thereof, property consisting of real estate belongs to the municipality within which it is located as the result of the division. (Id.)
5. **ILLEGAL CONTRACT BY MEMBER OF COUNCIL—IMPLIED CONTRACT PROHIBITED.**—The provisions of a city charter and of the Political Code forbidding a member of the city council to be directly or indirectly interested in any contract made by the council, and of the Penal Code providing a penalty therefor, apply both to express and implied contracts; and a member of such council who has expressly contracted with it for the sale of lumber and materials to the city, cannot recover their value upon an implied contract. (Berka v. Woodward, 119.)
6. **RECOVERY UPON IMPLIED CONTRACT, WHEN PERMISSIBLE.**—It is only where contracts of public officers with their counties or municipalities have not been expressly forbidden by law, and are not *malum in se*, but are merely considered contrary to public policy, that the officer is allowed to recover upon an implied contract, upon a *quantum meruit* or *quantum valebat*. But no recovery of any kind can be had where the contract is either *malum in se*, or expressly prohibited. (Id.)
7. **EFFECT OF PENALTY—ILLEGAL CONTRACT.**—Where a statute pronounces a penalty for an act, a contract founded upon such act is void, even though the statute does not pronounce it void nor expressly prohibit it. (Id.)
8. **ALLOWANCE OF CLAIM BY COUNCIL—DUTY OF TREASURER—MANDAMUS.**—The allowance of a claim by the city council for the value of lumber and materials sold to the city by a member of the council

MUNICIPAL CORPORATIONS (Continued).

does not give the claim a validity not otherwise possessed. It is the duty of the treasurer to pay only legal demands against his funds; and he cannot be compelled by *mandamus* to pay such claim. (Id.)

9. **WATERWORKS—VOID BONDS—CONTROL OF FUNDS RAISED BY TAXATION.**—Money raised by taxation toward the payment of void municipal bonds voted for the construction of waterworks by the city, is free from the direction of the statute, and need not be kept in a water-bond fund; but, if free from the claims of the taxpayers who paid it, it may be transferred by the city authorities to the general fund, and may be used by them in proper expenditures to secure plans and estimates of cost from an engineer for proposed waterworks, before submitting the question of bonds again to the people. (*Irwin v. Exton*, 622.)
10. **INJUNCTION—SUIT BY RESIDENT PROPERTY-HOLDER.**—An elector and resident property-holder of the city, who does not seek to recover any part of the taxes paid to the city upon void water-bonds, cannot maintain a suit in equity for an injunction to restrain the city authorities from transferring the money raised by taxation therefor to another fund, to be used for a lawful purpose by the city. (Id.)
11. **REMEDY AT LAW FOR PERSONS AGGRIEVED.**—A court of equity will not restrain the officers of a municipality from doing an act which will not injure the complaint, and in a matter where there is an adequate remedy at law given to persons aggrieved. (Id.)
12. **PRINTING OF DELINQUENT TAX LIST—ADVERTISEMENT FOR BIDS—POWER OF SUPERVISORS—RATIFICATION.**—The board of supervisors has no power to make a contract for the printing of the delinquent tax list without a previous advertisement for bids, as required by statute; and not having the power to make such a contract in the first instance, they cannot call it into existence by subsequent ratification. (*Smeltzer v. Miller*, 41.)
13. **ALLOWANCE OF ILLEGAL CLAIM—INJUNCTION SUIT BY TAXPAYER—LAW OF THE CASE.**—A taxpayer may maintain a suit to enjoin the county auditor from drawing his warrant upon the county treasurer in favor of a publisher of the delinquent tax list, who had no valid contract with the board of supervisors for such publication, though the claim therefor has been allowed by the board of supervisors. *Smeltzer v. Miller*, 113 Cal. 163, affirmed, and held to be the law of the case. (Id.)

See Counties; Elections, 1-3.

MURDER AND MANSLAUGHTER. See Criminal Law, 11-29.

MUTUAL BENEFIT ASSOCIATION.

1. **BENEFIT SOCIETY—CONTRACT OF MEMBER WITH BENEFICIARY.**—The valid contract of a member of a benefit society, such as the An-

MUTUAL BENEFIT ASSOCIATION (Continued).

- cient Order of United Workmen, whereby he assumes to dispose of his interest in the beneficiary fund of the order—virtually the proceeds of a policy of life insurance—and agrees not to change the beneficiary in consideration of the payment by the beneficiary of all dues and assessments against such member, if not in conflict with the lawful conditions upon which the order grants the insurance, is effectual as against the subsequent attempt of the member to change or annul it. (*Grimbley v. Harrold*, 24.)
2. **BENEFICIARY CERTIFICATE—PROPERTY RIGHT—POWER OF JUDICATORIES.**—The beneficiary certificate issued to the member, like a policy of insurance, evidences a valuable right of property, of which he may dispose by valid contract; and it is not competent for the order, while clothing the member with such right, to confer upon its internal judicatories the sole power of determining the fact and consequences of any disposition which he may make of it. (*Id.*)
3. **RIGHTS OF BENEFICIARY—DECISION OF BOARD OF ARBITRATION—APPEAL—JURISDICTION OF COURTS.**—The decision of the board of arbitration of the order upon the rights of a beneficiary who is not a member of the order is not conclusive as to those rights; and the beneficiary is not bound to appeal therefrom to the grand lodge, but may submit to the jurisdiction of the courts of the state the questions whether the member contracted with the beneficiary, as alleged, and what rights, if any, were thereby acquired. (*Id.*)
4. **PRESENTATION OF PROOFS—ARBITRATION.**—The presentation of proofs by the beneficiary to the order cannot convert a hearing before a committee of the order, in whose selection the beneficiary had no choice, into an arbitration binding upon the beneficiary; and it is immaterial that such committee is called a board of arbitration. (*Id.*)
5. **CHANGE OF BENEFICIARY—SUPERIORITY OF RIGHT—ESTOPPEL—NOTICE PUTTING UPON INQUIRY.**—Upon an attempted change of beneficiary by the member, after having disposed of his rights by valid contract with a prior beneficiary, the newly-appointed beneficiary cannot claim a superior equitable right nor an estoppel, as against the prior beneficiary, merely because no information was given as to the terms of the contract under which the prior certificate was held when its surrender was demanded by the member, it being sufficient to put the new beneficiary upon inquiry as to the ground of the claim of the former beneficiary that he had notice that the right of the member to change the certificate was denied by the prior beneficiary. (*Id.*)
6. **CONSIDERATION OF CONTRACT—PLEADING—EVIDENCE—FINDINGS.**—Under a complaint alleging that the consideration of the contract pleaded was the agreement of the beneficiary to pay all dues and assessments against the member, evidence that part of the considera-

MUTUAL BENEFIT ASSOCIATION (Continued).

tion was that care was bestowed on the member, who was an uncle of the beneficiary, during his illness, is admissible and relevant as tending to make probable the matter averred; and a finding based upon such evidence is not prejudicial, if not within the issues, when the facts found within the issues show a valid contract. (Id.)

NEGLIGENCE.

1. **SUPPORT OF VERDICT—CONFLICTING EVIDENCE—PRESUMPTION UPON APPEAL.**—In an action to recover damages for personal injuries alleged to have been caused by the negligence of the defendant, where the evidence is conflicting it must be presumed upon appeal from a judgment for the plaintiff that the jury believed those witnesses whose testimony was favorable to the plaintiff. (*Hennesey v. Bingham*, 627.)
2. **ASSUMPTION OF RISK BY SERVANT—QUESTION FOR JURY—REFUSAL TO INSTRUCT FOR DEFENDANT.**—Where the jury were warranted in finding from the evidence that the mode adopted by the defendant in carrying on the work in which plaintiff was employed was unusually and unnecessarily hazardous, and that in the hurry and noise of the work the warning given was insufficient to protect the workmen from dangers attending the work, the question whether the plaintiff by accepting the employment, assumed the risk of the injury suffered is for the jury to determine, and it was proper to refuse to instruct them to find for the defendant. (Id.)
3. **DUTY OF MASTER TO PROVIDE SAFE PLACE—FORMER EXPERIENCE OF SAFETY—QUESTION FOR JURY.**—It is the duty of a master to use due diligence to provide his servant with a safe place in which to do his work. Former experience of safety may have some bearing upon the question as to whether he has taken the proper precautions, but its value is for the jury to determine, and it is not a proper basis of an instruction to find for the defendant. (Id.)
4. **NEGLIGENCE, WHEN A QUESTION FOR JURY.**—When different conclusions as to negligence can reasonably be drawn from the admitted facts, the inference as to the ultimate fact is within the province of the jury, though the facts are undisputed; and it is not proper for the court to instruct the jury as to which inference is to be adopted by them. (Id.)
5. **MISLEADING INSTRUCTION—SECURITY OF DEFENDANT BY WARNING FROM FELLOW-SERVANT—ASSUMPTION OF UNUSUAL RISK—QUESTIONS FOR JURY.**—A requested instruction to find for the defendant, if the jury should find that plaintiff accepted the employment with the understanding that his safety was to be secured by the giving of a warning required to be given by a competent fellow-servant, and such further care on his part as should be necessary, is misleading, in not submitting to the jury the questions of fact raised by the evi-

NEGLIGENCE (Continued).

dence whether the defendant was not subjected to unusual risk at the time of the injury, and whether, under the circumstances, the defendant understood and had the right to believe that plaintiff knew and assumed the unusual risk. (Id.)

6. **OBJECT OF WARNING—NEGLECT OF FELLOW-SERVANT—NEGLECT OF MASTER TO PROVIDE SAFE PLACE.**—Under a warning provided by the master as additional security to the workmen from the ordinary risks of accident, in a hazardous employment conducted by the master with ordinary care, the employer is not protected by the neglect of the fellow-servant of the plaintiff to give adequate warning, if the master has contributed to the injury by failure on his part to use ordinary care in the mode of doing the work, by which he has neglected to provide a safe place for his workmen, and subjected them to unusual risks not assumed by them, when they accepted the employment, in which case he cannot evade responsibility for his duties by putting them upon a fellow-servant. (Id.)
7. **EVIDENCE—CUSTOM AMONG STEVEDORES IN HANDLING LUMBER.**—Where the plaintiff was an experienced stevedore employed by the defendant in handling lumber, lowered into the hold of a vessel, and was injured by the slipping of lumber from an unsecured end of a lowered box, which bounded upon him, evidence for the defendant is admissible to show what was the custom of stevedores in handling such lumber, and what were the respective duties of the workmen engaged in the work, and especially the duties of the hatchman and other servants engaged in lowering the freight; and such evidence is relevant and material as tending to show what care was taken by the defendant in the work, and also what risks the plaintiff assumed by the employment. (Id.)
8. **INJURY OF STREET SWEEPER BY VEHICLE—INSTRUCTION—SLIPPING OF WHEELS.**—In an action to recover damages for personal injuries caused to the plaintiff while sweeping the street, by the negligent and too rapid driving of defendant's vehicle, which struck plaintiff with its wheels, where there is evidence tending to sustain the action, an instruction to the effect that it cannot be said that the mere slipping of the wheels upon the wet street-car track, while the driver was attempting to turn out to avoid striking the plaintiff, would not conclusively, or as matter of law, repel the imputation of negligence, is proper, and does not charge the jury with respect to matters of fact. (Roche v. Redington, 174.)
9. **SUPPORT OF VERDICT—SUFFICIENCY OF EVIDENCE.**—Where the evidence in such action, though conflicting upon some points, tended to show that the vehicle was driven with considerable speed almost onto the plaintiff, before the driver pulled the horse out of the street-car track, and that plaintiff was struck by the hind wheels of

NEGLIGENCE (Continued).

the vehicle, which held the track, and slewed forward, and that the injury was the result of want of ordinary care and prudence, if not of recklessness, on the part of the driver, and was without the fault of the plaintiff, who was not aware of his danger, the evidence is sufficient to justify a verdict for the plaintiff. (Id.)

10. **EXCESSIVE DAMAGES—REVIEW UPON APPEAL—PASSION OR PREJUDICE.**—Where the evidence tends to show that the injury to the plaintiff was serious, and resulted in the permanent shortening of a broken leg, and rendered plaintiff less able than formerly to do a day's work, and that he had recovered at the time of the trial, and was then suffering pain from the injury, a year and a quarter thereafter, a verdict for damages, in the sum of four thousand dollars, cannot be said by this court to have been given as to any excess by the jury under the influence of passion or prejudice, on which ground alone can the amount of a verdict for damages be disturbed upon appeal, as excessive. (Id.)
11. **EVIDENCE—ABILITY TO EARN MONEY.**—A question asked of the plaintiff, whether he had earned any money since the accident, or had been able to earn any money since, is not objectionable, where it appears from the evidence of plaintiff, in connection therewith, that the question related to his condition as the result of the accident. (Id.)
12. **MASTER AND SERVANT—USE OF DEFECTIVE APPARATUS—PLEADING—FAILURE TO AVER NEGLIGENCE.**—A complaint in an action by a servant to recover damages for personal injuries, which alleges that the injuries described resulted from the use of defective apparatus described, supplied by the master for the servant's use, with notice of its defective condition, in breach of the alleged duty of the master to supply him with good apparatus of the kind described, states a cause of action; and, at least in the absence of a special demurrer, is not defective in not expressly averring the negligence of the master. (Silveir v. Iverson, 266.)
13. **AVERMENT OF NEGLIGENCE, WHEN REQUIRED.**—In cases where the facts stated do not constitute a cause of action unless the alleged acts were done negligently, it must be averred that they were so done, unless the facts themselves necessarily exclude any hypothesis other than that of negligence. But where the facts alleged do of themselves constitute a cause of action, whether done negligently or intentionally, an averment of negligence is not essential. (Id.)
14. **DUTY AND LIABILITY OF MASTER TO SERVANT.**—From the relation existing between master and servant, it is the duty of the master to supply the servant with sufficient apparatus for his use; and he is liable for personal injuries to the servant resulting from supplying him with apparatus known to be defective, whether his wrongful act was the result of his negligence, or intention, or other cause. (Id.)

NEGLIGENCE (Continued).

15. **DEFECTIVE SPARK-ARRESTER—SUBROGATION OF FIRE INSURANCE COMPANY.**—A fire insurance company which has been compelled to pay insurance upon premises destroyed by fire caused by a defective spark-arrester upon an engine, may, by subrogation to the rights of the owner of the premises, compel the railroad company to reimburse it for the amount of such payment if there was no contributory negligence upon the part of the owner. (Liverpool, London and Globe Insurance Company v. Southern Pacific Company, 434.)
16. **CONTRIBUTORY NEGLIGENCE—USE OF REASONABLE PRECAUTIONS BY OWNER—QUESTION FOR JURY.**—Where it appears that the owner of the burned premises did not directly know that the engine used was dangerous, and did not invite the use of that particular engine, and used counter-precautions against the risk of fire by employing a man to watch and guard against the danger, the question whether those precautions were such as reasonable care would dictate is for the jury. (Id.)
17. **DEBATABLE QUESTION OF PRUDENCE.**—If it is fairly debatable whether or not the owner of the premises acted with ordinary prudence, in the light of the knowledge possessed, the question of contributory negligence is not determined by the result, but is one of fact for the jury. (Id.)
18. **RELATION OF ACTS TO REQUIRED CARE.**—The question whether acts of the owner came up to or fell short of the degree of care required of him by law, is one of fact for the jury. (Id.)
19. **HYPOTHETICAL INSTRUCTION AS TO ORIGIN OF FIRE—PROVINCE OF JURY.**—Where the evidence as to the cause and origin of the fire was circumstantial, an instruction grouping the facts in hypothetical form, and telling the jury that if they believe these facts to be established by the evidence, a *prima facie* case is made out which would warrant the jury in finding that the engine of the defendant caused the fire, does not invade the province of the jury, and is not argumentative or unfair. (Id.)
20. **INSTRUCTION AS TO PROBABILITY OF ORIGIN.**—A portion of such instruction that "if, upon the whole evidence, and taking into consideration all the conditions and circumstances surrounding the fire, you will find it more probable that the fire was caused by sparks escaping from the swing engine than from any other cause, your finding upon that point, to wit, the origin of the fire, should be accordingly," does not throw the question into the domain of conjecture and surmise; but the question as to the probability of the origin of the fire is properly left to the jury to determine from the circumstantial evidence. (Id.)
21. **INSTRUCTION AS TO COUNTER-PRECAUTIONS—ASSUMPTION OF UNDISPUTED FACT.**—Where the court properly left it to the jury to determine the reasonable sufficiency of the counter-precautions used by the owner of the property, the assumption in the instruction to

NEGLIGENCE (Continued).

the jury of the undisputed fact that counter-precautions were used, is not objectionable, and could not injure the defendant. (Id.)

22. **EVIDENCE—PROOFS OF LOSS.**—The proofs of loss made by the owner of the insured buildings which were destroyed by fire were admissible in evidence for the limited purpose of establishing the liability of the insurance company plaintiff to such owner for the moneys paid upon the insurance, for which reimbursement was claimed from the defendant. (Id.)
23. **STIPULATION—OFFER OF DEFENDANT—INSTRUCTION.**—The admission in evidence of a stipulation between the parties, which upon its face is made admissible in evidence, and which contained a declaration that defendant had offered to pay the owner of the premises a large sum in addition to the insurance money, is not prejudicial to the defendant, where the court instructed the jury, at defendant's request, that said offer was of itself neither an admission that the defendant had been guilty of negligence, nor that it had caused the fire, nor that anything was due to the owner of the premises, or the plaintiff, by reason of the fire. (Id.)
24. **ACTION FOR DEATH—NEGLIGENCE—DISCHARGE OF PISTOL CARELESSLY HANDLED.**—One engaged in manipulating a loaded pistol in presence of others should use great care in the manipulation; and in an action for a death caused by the discharge of a pistol carelessly handled, the negligence of the defendant is sufficiently shown by evidence that the loaded pistol was pointed by him in the general direction of the deceased, with knowledge thereof, and was being manipulated in a manner likely to cause it to be fired. (Glueck v. Scheld, 288.)
25. **CONTRIBUTORY NEGLIGENCE—POSITION OF DECEASED.**—The position of the deceased, about forty feet off at an angle from a target, at which defendant and others had been firing, and about one hundred and fifty feet from the defendant, when the loaded pistol of the defendant, without being fired at the target, was negligently discharged, thereby causing his death, did not constitute contributory negligence *per se*; and the jury were justified in finding that his position when killed was not in itself a dangerous one, and that he was not guilty of contributory negligence in being at that point, at that time. (Id.)

See Estates of Deceased Persons, 4-9; New Trial, 15.

NEGOTIABLE INSTRUMENTS.

1. **NOTE, WHEN NOT PAYMENT.**—In the absence of an agreement that a note shall be taken in payment of the debt, or of evidence that such was the intention of the parties, the taking of a note for an existing liability does not constitute a payment or reduction of the amount of the debt. (London and San Francisco Bank v. Parrott, 472.)

NEGOTIABLE INSTRUMENTS (Continued).

2. **EFFECT OF NOTE—ACTION UPON ORIGINAL DEBT.**—A note, given for a debt, which is payable immediately, does not suspend the right of action upon the original debt; and suit may be brought thereon at any time, regardless of the note. The note is evidence of the existing debt, and does not change the amount or character of the liability. (Id.)
3. **ACCOUNTS OF BANK—CREDIT OF NOTE—CLOSING OF OVERDRAFT ACCOUNT.**—The credit of the note upon the accounts of the bank merely for the purpose of closing the overdraft account upon its books, does not change the liability, or reduce the amount of credit received by the maker of the note from the bank. The real account of credit given was not closed by the footing thus made. (Id.)
See Corporations, 13, 19; Estates of Deceased Persons, 42-45; Guaranty, 9-12; Mortgage, 1, 2.

NEW TRIAL.

1. **MISCONDUCT OF JURY—AFFIDAVITS—STATEMENT.**—A motion for a new trial made solely on the ground of misconduct of the jury, must be made upon affidavits; and, in such case, a statement is unauthorized, and must be disregarded. (*Saltzman v. Sunset Telephone and Telegraph Company*, 501.)
2. **DEPOSITION TAKEN IN COURT.**—The deposition of the deputy sheriff in charge of the jury, who refused to give a voluntary affidavit must be regarded as an affidavit for the purposes of the motion. (Id.)
3. **RULING AS TO EVIDENCE—AFFIDAVIT OF DISSENTING JUROR—BILL OF EXCEPTIONS—REVIEW UPON APPEAL.**—The ruling of the court in disregarding the affidavit of a dissenting juror as to the misconduct of a juror assenting to the verdict, need not be specifically excepted to or appealed from; but if all of the affidavits and the ruling upon the motion are incorporated in a bill of exceptions, the appellate court may review the competency of the affidavit upon appeal from the order denying a new trial. (Id.)
4. **IMPEACHMENT OF VERDICT BY JURORS—REASONS FOR RULE—PUBLIC POLICY.**—The rule that the affidavits of jurors are not admissible to impeach the verdict, is proved by the statutory exception in case of a resort to chance. The rule is not based solely upon the estoppel of the assenting jurors, but is grounded upon public policy which forbids that the verdict should be imperiled by the evidence of jurors who may be tampered with to accuse themselves or other jurors, and which requires that the independence and freedom from improper restraint of the jury in their deliberations and discussions should be secured. (Id.)
5. **APPLICABILITY OF RULE TO DISSENTING JURORS—DECLARATIONS OF ASSENTING JUROR.**—The rule against the affidavits of jurors is not

NEW TRIAL (Continued).

changed in its application by the amendment of the Code of Civil Procedure which permits a verdict by a specified majority of the jury; and the affidavit of a dissenting juror it not admissible to prove the declaration of an assenting juror whose vote was necessary to the verdict that he would rather agree to the verdict than lose his pay. (Id.)

6. **AFFIDAVIT OF JUROR TO SUSTAIN VERDICT.**—The affidavit of a juror is competent to sustain the verdict by explainng or denying alleged misconduct or interferences with the jury. (Id.)
7. **SEPARATION OF JURY IN CIVIL CASE.**—The mere separation of a jury in a civil case is not ground for a new trial, except under the general ground of misconduct of the jury “materially affecting the substitute rights of a party. (Id.)
8. **SEPARATION AGAINST INSTRUCTIONS—BURDEN OF PROOF.**—The separation of a juror from the jury against the instruction of the court under such circumstances that improper influence might have been exerted upon him, puts upon him the burden of proving the contrary to sustain the verdict. (Id.)
9. **USE OF TELEPHONE IN DININGROOM—REBUTTAL OF PRESUMPTION OF INJURY.**—Where it is shown by the affidavits of the juror and of the deputy sheriff that the juror, though improperly allowed to separate himself from the body of jurors in a diningroom, merely stepped to a telephone, therein to communicate briefly on private business, and that he had no other communication, the presumption of injury is rebutted. (Id.)
10. **PERMISSION OF COURT—DUTY OF JUROR AND DEPUTY SHERIFF.**—It is improper for a juror to communicate by telephone without first obtaining the permission of the court to send a message, and the deputy sheriff in charge of the jury should be at the receiver. (Id.)
11. **ACTION TO VACATE FORECLOSURE AND DEED—MOTION FOR NEW TRIAL—PRESUMPTION OF PENDENCY.**—In an action to vacate a decree of foreclosure, and a deed executed thereunder, and to be allowed to redeem, where the complaint shows that a motion for a new trial was made in the original action, in the absence of any averment to the contrary, it will be presumed that the motion is still pending and undetermined. (Johnson v. Reed, 74.)
12. **ABANDONMENT OF MOTION BY CODEFENDANT.**—An averment that one of the codefendants in the foreclosure suit had changed his attorneys and abandoned the motion, is insufficient to show that the plaintiff here was precluded from prosecuting his own motion, or from appealing from the judgment in the original action. (Id.)
13. **INDEPENDENT ACTION—GROUNDS AVAILABLE IN ORIGINAL ACTION.**—The plaintiff in an independent action to vacate a judgment rendered in another action cannot avail himself of any grounds which were available to him in the original action, and which he has sought to have reviewed by motion for a new trial therein, and might have had reviewed upon appeal. (Id.)

NEW TRIAL (Continued).

14. **INSUFFICIENT COMPLAINT—PREMATURE FORECLOSURE—FRAUD—ADJUDICATION.**—A complaint in an action to set aside a foreclosure decree and sale, which averred that one of the defendants to such action had fraudulently induced the premature commencement of the foreclosure suit, that he might obtain title under the sale, and that the answer therein showed that the time to commence the action had been extended, and that judgment was rendered for the plaintiff, shows on its face that the court must have found and adjudged that the action was not premature, and is insufficient to show any fraud, or any ground for relief. (Id.)
15. **CONDITIONAL ORDER—EXCESSIVE VERDICT—DAMAGES FOR NEGLIGENCE—CONFLICTING EVIDENCE.**—In an action to recover damages for negligence, where the evidence was conflicting as to the extent of the injuries sustained at the time of the accident, which at that time appeared to be small, and as to whether distressing symptoms afterward manifested were or were attributable to those injuries, the action of the trial court in conditionally granting a new trial for an excessive verdict of twenty thousand dollars' damages, unless plaintiff should remit fifteen thousand dollars therefrom, is not an abuse of discretion. (Doolin v. Omnibus Cable Company, 141.)
16. **CONSTRUCTION OF CODE—"PASSION OR PREJUDICE"—INSUFFICIENCY OF EVIDENCE.**—In the provision of subdivision 5 of section 657 of the Code of Civil Procedure, for the granting of a new trial for "excessive damages, appearing to have been given under the influence of passion or prejudice" the only means of discovering the element of "passion or prejudice" within the meaning of the statute is by comparing the amount with the evidence before the court at the trial; and that expression is but one mode of saying that the evidence is insufficient to justify the verdict for excessive damages. (Id.)
17. **REVIEW UPON APPEAL—CONFLICTING EVIDENCE—DISCRETION.**—The review upon appeal of the action of the trial court in granting a new trial absolutely or conditionally for excessive damages, where there is a material conflict of evidence, will be governed by the same rule as to abuse of discretion, as if the ground of the order were insufficiency of the evidence to justify the verdict. (Id.)
18. **STATEMENT—SPECIFICATIONS—INSUFFICIENCY OF EVIDENCE.**—Specifications in a statement on motion for new trial of the insufficiency of the evidence to justify the findings, must state the particulars in which the evidence is claimed to be insufficient, and a mere general statement that the evidence is insufficient to justify a finding should be disregarded. (Kyle v. Craig, 107.)
19. **STATEMENT—ABSENCE OF SPECIFICATIONS.**—A statement on motion for a new trial which contains no specifications of the insufficiency of the evidence to justify the findings or of errors of law occurring

NEW TRIAL (Continued).

at the trial and excepted to by the defendants, must be disregarded on the hearing of the motion. (*Thompson v. City of Los Angeles*, 270.)

20. **ORDER DENYING NEW TRIAL—REVIEW UPON APPEAL—“DECISION AGAINST LAW.”**—A specification in the notice of the motion for new trial, that “the decision is against law,” for any reason appearing upon the face of the judgment-roll, such as a failure to find upon a material issue, or that wrong conclusions of law have been drawn from the findings, can only be considered in this court upon an appeal from the judgment, and will be disregarded where the only appeal is from an order denying a new trial. (*Id.*)
21. **MOTION FOR NEW TRIAL—DISMISSAL—STATEMENT—REVIEW UPON APPEAL.**—The dismissal of a motion for a new trial is, in legal effect, a denial of the motion, and when the motion was made upon the minutes of the court, a statement must be prepared by the moving party, in order that the motion may be considered upon its merits upon appeal from the order, upon other grounds than those specified in the order dismissing the motion. (*Davis & Son v. Hurgren*, 48.)
22. **NOTICE OF INTENTION—RECEIPT BY CLERK—NONPAYMENT OF FEES—INSUFFICIENT FILING.**—A notice of intention to move for a new trial need not be filed by the clerk without the payment of the fees therefor in advance. The mere receipt of such a notice by the clerk on the last day for filing the same did not constitute a filing, where the clerk did not file it on account of nonpayment of the fees therefor; and a filing made three days thereafter, upon payment of such fees, though made as of the day of receipt of it by the clerk, at the request of the moving party, is too late, and cannot save the motion, and it is properly dismissed or denied. (*Id.*)
23. **DELAY IN SERVICE OF STATEMENT—ABSENCE OF EXCUSE—REVIEW UPON APPEAL.**—If a settled statement on motion for a new trial shows that the settlement thereof and the hearing of the motion were objected to on the ground that the proposed statement was not served within the time allowed by law, and that it was not served within ten days after service of the notice, it devolved upon the moving party to incorporate into the statement any matter excusing the delay; and if it does not appear therefrom that any extension of time was granted by stipulation or order, or that there was any excuse for the delay, the settled statement cannot be considered upon appeal; and it must be presumed that the findings were supported by the evidence, and that the rulings on the trial were correct. (*Wheeler v. Karnes*, 51.)
24. **MISCONDUCT OF JURY—CONVERSATION, DRINKING, AND CAROUSAL WITH PARTIES.**—The misconduct of jurors whose concurrence was essential to the verdict, in conversing about the case with parties

NEW TRIAL (Continued).

to the action, and in drinking and carousing with one of the pre-waiving parties, is such misconduct as entitles the losing parties to a new trial, irrespective of counteraffidavits that the treating of and drinking with the jurors was indulged in by both parties to the litigation, and that their verdict was uninfluenced by the misconduct complained of. (*Wright v. Eastlick*, 517.)

25. **EXCESSIVE DAMAGES FOR SLANDER—CONDITIONAL ORDER—POWER OF COURT.**—Upon a motion for new trial upon the ground that excessive damages were awarded by the jury to the plaintiff in an action for slander, under the influence of passion or prejudice, the court has power to make a conditional order granting a new trial, unless the plaintiff shall remit the portion of the judgment for damages deemed by the court to be excessive. (*Sherwood v. Kyle*, 652.)
26. **DAMAGES FOR PERSONAL TORT—DUTY OF COURT—DISCRETION—REVIEW UPON APPEAL.**—In an action for damages for a personal tort, the court should not substitute its judgment for that of the jury, and should not grant a new trial for excessive damages, unless it is so excessive as to indicate that it was given under the influence of passion or prejudice. But the action of the court in granting a new trial upon that ground will not be disturbed upon appeal where it does not clearly appear that its discretion to grant it has been abused. (*Id.*)
27. **ORDER GRANTING NEW TRIAL—REVIEW OF GROUNDS OF MOTION.**—An order granting a new trial upon any ground may be sustained by the respondent upon any point involved in the motion. (*Id.*)
28. **NEWLY-DISCOVERED EVIDENCE.**—A new trial cannot be granted for alleged newly-discovered evidence when it appears that the knowledge of such evidence was in the possession of the moving party, while the case was pending, and he did not see fit to avail himself of the benefit of it. (*County of Sonoma v. Stofen*, 32.)
29. **NEWLY-DISCOVERED EVIDENCE—DISCRETION.**—A motion for a new trial upon the ground of newly-discovered evidence rests much in the discretion of the court, and the ruling of the court thereupon will not be disturbed, unless there has been a clear abuse of discretion. (*Tibbet v. Tom Sue*, 455.)
30. **SUSPICION AS TO NEW EVIDENCE—CLEAR SHOWING REQUIRED.**—Newly discovered evidence after defeat is looked upon with suspicion; and the moving party must make a clear case showing due diligence on his part, and the truth and materiality of the evidence. (*Id.*)
See Appeal, 1, 2, 6-8; Broker, 2.

OFFICE AND OFFICERS.

1. **DEPUTIES AND ASSISTANTS OF COUNTY CLERKS—CONSTITUTIONAL LAW—LOCAL AND SPECIAL LEGISLATION.**—The act of 1880 (Stats. 1880, p. 20), in relation to deputies, assistants, and copyists of county clerks, and providing for their appointment and compensation, in any city and county having more than one hundred thousand inhabitants, and the act of 1891, amendatory thereof (Stats. 1891, p. 5), are in violation of section 5, of article XI, of the constitution, requiring the appointment and duties of officers to be regulated by general laws, and providing only for a classification of counties to fix their compensation, and of subdivision 28, of section 25, of article XI, of the constitution, forbidding local or special laws creating offices, or prescribing the powers and duties of county or municipal officers. *City and County of San Francisco v. Broderick*, 188.)
2. **CONSTRUCTION OF COUNTY GOVERNMENT ACT—APPOINTMENT AND COMPENSATION OF DEPUTIES.**—Section 61 of the County Government Act, allowing the appointment by certain county officers, including the county clerk, or as many deputies as may be necessary for the prompt and faithful discharge of the duties of his office is to be construed in connection with section 216 of that act, providing that deputies employed shall be paid by their principals out of their salaries, unless in the act otherwise provided, and in connection with those provisions of the act which expressly limit the number of deputies allowed at fixed salaries payable out of the treasury in specified classes of counties. (Id.)
3. **UNCONSTITUTIONAL CONSTRUCTION—CONTROL OF COUNTY FUNDS.**—The County Government Act cannot be construed as permitting the county clerk to make the compensation of any number of deputies that he may choose to appoint, a charge upon the county treasury, without violating section 13 of article XI, of the constitution, prohibiting the delegation to any individual, of the control of any county money, property, or effects. (Id.)
4. **COMPENSATION OF SUPERVISORS AS ROAD COMMISSIONERS—REPEAL OF CODE PROVISION—COUNTY GOVERNMENT ACT—CONSTITUTIONALITY—MANDAMUS.**—Section 2641 of the Political Code, regulating the compensation of supervisors as *ex officio* road commissioners, as amended March 9, 1893, was repealed by those provisions of the County Government Act, passed March 24, 1893, which were inconsistent therewith, and to which there is no valid constitutional objection; and mandamus will not lie to compel the issuance of a warrant based upon that section of the Political Code, regardless of whether such compensation is now governed by section 195 of the County Government Act of 1893, or by section 191 of the County Government Act of 1897, to which constitutional objections are urged, which are not passed upon. (*Davis v. Post*, 210.)
5. **BOARD OF EDUCATION—EMPLOYMENT OF JANITOR—PREFERENCE OF EX-UNION SOLDIERS—MANDAMUS.**—An ex-Union soldier who was

OFFICE AND OFFICERS (Continued).

employed for one year as janitor by the board of education of a school district, and who, after the expiration of his term of employment, was superseded by another appointee, not preferred under the act of March 31, 1891, providing for the preference of honorably discharged ex-Union soldiers, sailors, and marines of the war of the Rebellion, in appointments for public office, cannot maintain a proceeding in mandate to compel a preference of himself for the appointment without a showing that he was the only man coming under the provisions of the act who was desirous of the appointment. (Allison v. Board of Education, 72.)

6. **COMMISSIONER OF PUBLIC WORKS—TERMINATION OF OFFICE.**—The office of commissioner of public works was abolished in March, 1899, by the terms of the amendment of 1897 to the act of 1893, creating the office. (Leake v. Colgan, 413.)
7. **TITLE OF AMENDATORY ACT—CONSTITUTIONAL LAW.**—The fixing of the term and tenure of the office, and the duration of its existence, or the abolition thereof after a fixed period, being matters germane to the subject of the original act, they may constitutionally find expression in the amendatory act without specific mention of them in the title of the amendatory act. (Id.)
8. **ACTION UPON BOND OF TAX-COLLECTOR—BURDEN OF PROOF—DEFAULT—PAYMENT.**—In an action against a tax-collector, on his official bond, to recover money collected and not paid over, the burden of proof for the plaintiff is sustained by showing that the tax-collector made default in failing to pay over, at the end of his term, moneys due the county; and the burden of proof is then on the defendants to show payment in full. (County of Mendocino v. Johnson, 337.)
9. **MODE OF PAYMENT—OFFER OF PROOF.**—A payment to the tax-collector in a mode other than that expressly provided by law, will not exonerate the tax-collector or his bondsmen from an action by the county, unless it is proved that the county actually received the money, as distinguished from a mere deposit thereof with the treasurer. It is error to refuse an offer of proof that the county actually received the money, without proof first made of a compliance with the county government act by the tax-collector. (Id.)
10. **EVIDENCE—RECEIPTS TO TAX-COLLECTOR—TESTIMONY OF TREASURER—POSSIBLE AMENDMENT OF COMPLAINT.**—It is error to exclude from evidence receipts given by the treasurer to the tax-collector, notwithstanding the evidence of the treasurer that a receipt for \$3,000 was fraudulently obtained, and that no such payment was in fact made; nor can the exclusion be excused as without injury, on the ground that the complaint might thereafter be amended by charging the tax-collector with what he showed by the receipts was paid

OFFICE AND OFFICERS (Continued).

above the amount alleged, and crediting him accordingly, still leaving the discrepancy of \$3,000 to be accounted for by the tax-collector. (Id.)

11. **ACTION AGAINST COUNTY TREASURER—CONVERSION OF MONEY—DEFENSE OF ROBBERY—CLEAR PROOF REQUIRED.**—In an action against a county treasurer and the sureties on his official bond, for the alleged conversion by him of county funds, it is a proper defense that the treasury was robbed of such funds; but such defense must be clearly and satisfactorily established. (*County of Sonoma v. Stofen*, 32.)
12. **PROVINCE OF JURY—REJECTION OF SUSPICIOUS TESTIMONY.**—Although the evidence of one witness, if credited, is sufficient to establish the defense of robbery, yet the jury are not bound to give credit to the account of the robbery given by the defendant, and may reject it, if there are circumstances of doubt and suspicion attending his account of it, which give basis for an argument against its probability. (Id.)
13. **EVIDENCE—EFFORTS TO ESCAPE FROM VAULT—COMPARATIVE EXPERIMENTS.**—Where the treasurer testified that he was locked by robbers in the vault, and was confined there eight hours, and that he kicked upon the inner door with all his might, but did not kick or strike upon the sheet-iron lining of the sides of the vault; the construction of which was known to him, and that he occasionally heard footsteps passing outside—comparative experiments are admissible which tend to show that if his story were true, and he wished to give an alarm, and escape promptly from the vault, blows upon the resonant sheet-iron sides of the vault would have been much louder and more effective than kicks upon the inner door, if there is nothing to indicate that different atmospheric conditions would have materially affected the result. (Id.)

See Municipal Corporations.

ORPHAN ASYLUM.

1. **BEQUEST TO ORPHAN ASYLUMS—TECHNICAL SCHOOL FOR ORPHANS.**—A bequest of money "to be equally distributed among the orphan asylums of the city and county of San Francisco," does not include a "technical school" situated therein, the primary and main purpose of which is to give to orphan girls who are fourteen years old or more such special training as will fit them for certain vocations in life, and in which the work of the girls contributes to their support. (*Estate of Pearsons*, 285.)
2. **NATURE OF ORPHAN ASYLUM.**—The primary idea of an orphan asylum is that it is a place of safety, refuge, retreat, or sanctuary for indigent and dependent orphans who have no homes elsewhere, and to afford them a home with protection, support, et cetera, during the period of their dependency. (Id.)

PARENT AND CHILD. See Deed.

PARTIES. See Mortgage, 1.

PARTNERSHIP. See Corporations, 4-6; Insolvency, 17; Pleading, 6.

PAYMENTS.

1. **OVERDRAFT ACCOUNT—DEPOSITS—APPLICATION OF PAYMENTS.**—Where the original credit to the corporation was for overdrafts allowed by the bank, the deposits made by the corporation from time to time, of which no application was made by either party, must be made by the court, as of the date of each of the several deposits, in payment, first of the interest then due, and the remainder in payment of the principal, evidenced by checks for the overdrafts earliest in date, irrespective of the statute of limitations thereupon. (*London & S. F. Bank v. Parrott*, 472.)
2. **MAKING OF NOTE—AGREED APPLICATION OF PAYMENTS.**—The statute of limitations not having run against any items of the account at the time of the execution of the note, it was competent for the parties at that time to agree to the application of the deposits theretofore made, and the making and acceptance of the note for the amount agreed must be regarded as an agreement for the application of the deposits to the extinction of so much of the liability theretofore incurred as was not included in the note. (*Id.*)
3. **CHARGES OF MONTHLY INTEREST—PAYMENTS BY BANK—ADDITIONAL LOAN.**—The charges by the bank for monthly interest upon the overdrafts, which were paid by memorandum checks signed by the bank itself, were equivalent to an additional loan or advance of an amount equal to the monthly interest; and cannot affect the application of payments upon the general account to the unpaid interest. (*Id.*)
4. **SIMULTANEOUS DEPOSITS AND CHECKS—FINDING.**—The mere fact that the amount of deposits and checks upon a given date were identical in amount, does not of itself conclusively prove that these were independent transactions not subject to the rule for the application of payments in the general account to the earliest items thereof; and the finding of the court to the contrary will not be disturbed upon appeal. (*Id.*)
5. **PRESUMPTIONS AS TO DEPOSITS AND CHECKS.**—Deposits in a bank—being usually made before checks are drawn, in the absence of specific direction, are presumed to be applicable upon general account; and there is no presumption that such deposit was intended to be applied to a check that might thereafter be drawn. (*Id.*)
6. **APPLICATION OF PAYMENTS.**—Payments made by the corporation upon the running account of the plaintiff with the firm were properly applied to indebtedness on the account that had accrued prior to the date of the incorporation of the firm. (*Reid v. F. W. Kreling's Sons Co.*, 117.)

See Corporations, 14; Estates of Deceased Persons, 44, 45; Negotiable Instruments; Office and Officers, 8-10; Subrogation; Vendor and Vendee, 4.

PENALTY. See Guaranty, 1-4; Municipal Corporations, 7.

PHOTOGRAPHS. See Criminal Law, 25-27.

PLACE OF TRIAL.

1. **ACTION TO FORECLOSE MORTGAGE—CHANGE OF PLACE OF TRIAL—DISQUALIFICATION OF JUDGE—DENIAL OF MOTION BY SUCCESSOR.**—The ruling upon a motion to change the place of trial of an action to foreclose a mortgage on the ground of the disqualification of the judge, which was taken under advisement by the disqualified judge, and never passed upon, and was again called up for hearing before his successor, who was qualified to try the case, is to be tested by the conditions existing when the motion is passed upon, and the qualified judge may properly deny the motion. (*Santa Cruz Bank of Savings v. Taylor*, 249.)
2. **DUTY OF JUDGE—JURISDICTION OF COURT.**—The mere fact that the disqualified judge had no discretion, and could not have retained the case, or have called in another judge, did not deprive the court of jurisdiction of the action to foreclose the mortgage which was not in fact removed; and when the judge of that court became qualified to try the action, before the motion to change the place of trial was passed upon, there was no longer any foundation for the motion, and it was the duty of the qualified judge to retain the case. (*Id.*)
3. **CHANGE OF PLACE OF TRIAL—NONRESIDENT DEFENDANT—AFFIDAVIT OF MERITS.**—A nonresident defendant in an action to recover money, who, at the time of filing a demurrer to the complaint, filed a proper demand for the change of the place of trial to the county of his residence, and an affidavit of merits, showing the county of his residence, and that he has "fully and fairly stated the case in this cause" to his attorneys, naming them, and that, after such statement, he is by each of them advised, and verily believes, that he has "a good and substantial defense on the merits to said action," makes a sufficient showing of merits to entitle him to the change demanded. (*Nolan v. McDuffie*, 334.)
4. **DEMURRER TO COMPLAINT—JURISDICTION OF COURT—INVALID ORDER.**—Pending the hearing of a motion for the change of the place of trial by a nonresident defendant, and until it is passed upon, the court has no jurisdiction to hear and determine a demurrer to the complaint; and its order made in passing upon the same is a nullity. If the motion should be granted, the defendant is entitled to have the demurrer passed upon in the county of his residence. (*Id.*)
5. **VENUE OF REAL ACTION—DECREE TO BE CONSIDERED.**—In determining whether an action is, in effect, a real action, quieting title to land, or enforcing a lien thereon, which must be brought in the county where the land is situated, the court will consider not only the prayer for relief in the complaint and answers, but also the terms of the decree. (*Staacke v. Bell*, 309.)

PLACE OF TRIAL (Continued).

6. **DECREE AS TO EFFECT OF TRUST DEED.**—Under the complaint in an action not brought in the county where the lands described in a trust deed were situated, seeking to renew the trust deed and the promissory note by which it was secured, so as not to affect the rights of the parties to a prior action pending in the county where the lands were situated, brought to enforce a trust in favor of other parties against the trustor, who were made defendants to the new action, and under answers of the creditor and trustees named in the trust deed, seeking to protect the trust deed as a paramount conveyance and lien, a decree adjudging that the original trust deed is a first charge on the lands, and is and shall remain prior and superior to any claim, charge, or lien to or on said lands in favor of the other parties, cannot be rendered. Such relief can only be had in an action brought where the lands are situated. (Id.)

PLEADINGS.

1. **AMENDMENTS—DISCRETION—PRESUMPTION.**—Amendments to pleadings are within the discretion of the court below; and it is presumed that such discretion will be exercised in furtherance of justice, and with a view of disposing of cases upon their merits. The appellate court will not interfere, unless such discretion is abused. (San Joaquin Valley Bank v. Dodge, 77.)
2. **AMENDMENT TO ANSWER—STATUTE OF LIMITATIONS—SUBMISSION OF CAUSE.**—It is not an abuse of discretion to refuse to allow an amendment to the answer, so as to plead the statute of limitations, where the application therefor was not made until after the case was tried and submitted. (Id.)
3. **ACTION TO ENFORCE TRUST—DEMURRER TO COMPLAINT—SEPARATE COUNTS AS TO REAL AND PERSONAL PROPERTY.**—A complaint in an action to enforce a trust in real and personal property is not demurrable on the ground that the facts concerning the trust as to the real estate, and as to the personal property, are separately set forth in two counts for one cause of action. No such ground of demurrer is specified in section 430 of the Code of Civil Procedure; and no ground of demurrer not specified in that section can be considered. (Kyle v. Craig, 107.)
4. **MOTION TO COMPEL ELECTION.**—The defendant is not prejudiced by the arrangement of such complaint in two counts, where the facts as to the trust are fully set out; and the defendant cannot, by motion, compel the plaintiff to elect to proceed either upon the trust as to the real estate, or upon that as to the personal property. (Id.)
5. **CONTRACT PLEADED IN ANSWER—ADMISSION OF GENUINENESS AND DUE EXECUTION—EVIDENCE—AUTHORITY OF AGENT OR PARTNER.**—The genuineness and due execution of a contract, a copy of which is fully set forth in the answer, with the signatures thereto appended, must be deemed admitted for all the purposes of the trial.

PLEADINGS (Continued).

if not denied by affidavit, as provided in section 448 of the Code of Civil Procedure. Such contract need not be formally offered in evidence, nor its execution proved, nor need the authority be established of an agent or partner purporting to sign the names of the plaintiffs thereto. (*Knight v. Whitmore*, 198.)

6. **ACTION FOR LEGAL SERVICES—GENUINENESS OF CONTRACT IN FORMER FIRM NAME—DISSOLUTION OF FIRM—OBLIGATION OF REMAINING PARTNERS.**—In an action by two partners, to recover for legal services, where the genuineness and due execution of a written contract pleaded in the answer, which was signed in the name of a former firm, of which they were members, by a former partner, is admitted by failure to deny the same by affidavit, the plaintiffs are bound thereby individually after dissolution of the former firm, and cannot change for subsequent services contrary to its terms, in the absence of clear proof that the written contract was displaced by a second agreement. (*Id.*)
7. **PERFORMANCE OF SERVICES UNDER CONTRACT—EVIDENCE—WAIVER OF OBJECTION.**—Where the answer pleading the contract sets out matters fairly the equivalent of an allegation that the services of the plaintiffs were performed thereunder, and evidence to that effect was admitted without objection, the absence of a formal allegation to that effect is immaterial. (*Id.*)
8. **DEMURRER—AMBIGUITY AND UNCERTAINTY—REVIEW UPON APPEAL.**—Where the pleadings are verined, and there is a trial upon the merits, the appellate court will not reverse the judgment because of the overruling of a demurrer to a pleading for ambiguity and uncertainty, if it does not clearly appear that the demurring party was prejudiced thereby. (*Stephenson v. Deuel*, 656.)
9. **ACTION TO QUIET TITLE—ANSWER SEEKING TO QUIET DEFENDANT'S TITLE—AFFIRMATIVE RELIEF—DISMISSAL BY PLAINTIFF.**—In an action to quiet title, an answer setting up the defendant's title and praying for a decree establishing it, and enjoining plaintiff from asserting any interest in the land, or interfering with defendant's possession thereof, does not claim such affirmative relief under subdivision 1 of section 581 of the Code of Civil Procedure, as to preclude a judgment of dismissal of the action at the instance of the plaintiff. (*Wood v. Jordan*, 263.)
10. **PRAYER OF COMPLAINT—RELIEF AGAINST DEFAULTING DEFENDANT.**—No relief can be granted against a defaulting defendant in excess of that specifically prayed for in the complaint; and the general prayer for relief cannot enlarge the power of the court to grant relief not prayed for against the defaulting defendant. (*Staacke v. Bell*, 309.)
11. **PRAYER IN ANSWER OF CODEFENDANTS.**—A defaulting defendant has the right to assume that no relief will be granted beyond that which

PLEADINGS (Continued).

the complaint specifically seeks; and codefendants, whose answer is not served upon the defaulting defendant, cannot, by any prayer for affirmative relief therein, extend the specific relief properly granted, beyond that asked for in the complaint, as against such defaulting defendant. (Id.)

12. **ACTION FOR BREACH OF CONTRACT—COUNTERCLAIM.**—An action for the breach of a contract to deliver leather is an action "arising upon contract," and a counterclaim may be set up by the defendants therein for goods sold and delivered; and it is immaterial whether such counterclaim arises out of the transaction set forth in the complaint under subdivision 1 of section 438 of the Code of Civil Procedure, or is founded upon an independent contract, under subdivision 2 of that section. (*W. Davis & Son v. Hurgren & Anderson*, 48.)
13. **ALLOWANCE OF COSTS TO DEFENDANT.**—Upon the failure of the plaintiff to recover in the action, costs are to be allowed as a matter of course to the defendant, notwithstanding the recovery by the defendants of less than three hundred dollars upon their counterclaim. (Id.)
14. **DEMURRER FOR UNCERTAINTY—REVIEW UPON APPEAL—ERROR WITHOUT PREJUDICE.**—Error in the overruling of a demurrer to a complaint for uncertainty is not ground for reversal of a judgment, where no substantial injury appears; and where it appears that the rights of the defendant could have been fully protected at the trial by objection to evidence, notwithstanding the uncertainty of the complaint, any error in the overruling of a demurrer for such uncertainty is without prejudice. (*Holland v. McDade*, 353.)
15. **ACTION AGAINST SHERIFF—LEVY UNDER EXECUTION—STAY BOND—UNCERTAINTY OF COMPLAINT—OBJECTION TO EVIDENCE.**—In an action to recover damages for the refusal of a sheriff to release property levied upon under execution, where a stay bond was given upon appeal, error in overruling a demurrer to the complaint for uncertainty as to whether the damages claimed included damages resulting from the levy prior to the stay bond, is without prejudice, as it appears that the defendant might have protected his rights by objecting to the introduction of any evidence as to such prior damages. (Id.)

See Alimony, 1; Broker, 3; Claim and Delivery; Community Property, 1; Contempt, 2; Contract, 4, 12; Corporations, 7-9, 17; Counties, 3, 6; Forceful Entry and Detainer; Guaranty, 4; Guardian and Ward, 2, 5; Judgment; Mechanic's Lien, 10; Negligence, 12, 13; Practice; Vendor and Vendee, 2, 3; Way.

PLEDGE.

1. **PLEDGE OF MERCHANDISE BY PARTNERSHIP—ATTACHMENT—LEVIABLE INTEREST OF PLEDGORS.**—A transfer of a stock of merchandise by

PLEDGE (Continued).

a partnership to trustees as security for the payment of the claims of certain attaching creditors, who released their attachments when the transfer was made, is in the nature of a pledge, dependent upon actual possession. If the pledge is valid, the firm, as the owner of the property, subject to the rights of the trustees for the creditors, has a leviable interest which may be reached by garnishment; and if it is not valid, the property itself may be seized upon attachment by another creditor of the firm. (*Lilienthal v. Ballou*, 183.)

2. **STATUTE OF FRAUDS—DELIVERY AND CHANGE OF POSSESSION.**—In order to render such a pledge of the partnership property effective against seizure under an attachment by another creditor of the firm, the delivery to the trustees for the creditors must be as complete, and the actual change of possession as continuous and open, as is required in case of sales of personal property, by section 3440 of the Civil Code. (*Id.*)

3. **CONTINUANCE OF MANAGING PARTNER—INSUFFICIENT CHANGE OF POSSESSION.**—Where the agreement between the firm and the trustees for the creditors provided that the managing partner should be continued in employment, at a salary, subject to the supervision of the trustees, who did not take personal possession, and the business was continued under the control of the same manager, and with the same employees as before, and the conspicuous signs of the partnership were allowed to remain, with a small and less conspicuous sign added, containing the names of the trustees designated as successors to the firm, and the business continued to be advertised extensively in the name of the firm, there was no sufficient change of possession, to prevent seizure of the property under attachment by another creditor of the firm. (*Id.*)

4. **POSSESSION OF PLEDGORS—ATTACHED PROPERTY—EFFECTIVENESS OF PLEDGE—ACTUAL CHANGE OF POSSESSION.**—The fact the firm had no actual possession of the attached property which was in the custody of the sheriff when the agreement for the pledge was made, does not affect the necessity for a transfer of possession of the pledged property, to complete the validity of the pledge. The pledge had no effectiveness until possession was given; and that possession, when given, must be actual, and not constructive, and a change thereof could not be effectual by merely having the former owner manage the property as servant of the pledgee. (*Id.*)

See *Vendor and Vendee*, 4, 5.

POSSESSION. See *Ejectment*; *Forcible Entry and Detainer*; *Homestead*, 2, 3; *Pledge*; *Quieting Title*.

PRACTICE.

1. **ACTION—UNFILED STIPULATION FOR JUDGMENT—CONSENT TO DELAY—ESTOPPEL TO URGE DISMISSAL.**—An unfiled stipulation that the

PRACTICE (Continued).

plaintiff in an action may enter judgment against the defendant for a stipulated sum at any time, and that execution should be stayed while specified payments were made, is in lieu of an answer admitting the allegations of the complaint, and is a consent to the jurisdiction of the court, and to the entry of the appearance of the defendant, and of judgment after the time limited by statute, and estops the defendant from insisting upon a dismissal of the action, on the ground that plaintiff has not served the summons within three years, or prosecuted the action with diligence. (*Cooper v. Gordon*, 296.)

2. **TIME FOR APPEARANCE—WAIVER OF STATUTE—CONSTRUCTION OF CODE.**—A defendant may waive the provisions of section 406 and of subdivision 7 of section 581 of the Code of Civil Procedure, in regard to the time for his appearance, which are intended to relieve defendants from the assertion of stale demands and not to preclude a subsequent appearance without objection, or by consent of parties. (*Id.*)
3. **USE OF STIPULATIONS.**—Though stipulations do not bind the parties until filed, yet, when filed, they do bind the parties, and may then be used to show that a party has violated his stipulation, and as a basis of relief to the person who has been injured by trusting to it. (*Id.*)
4. **DISMISSAL FOR WANT OF PROSECUTION—VACATION OF JUDGMENT BY ASSIGNEE—PROOF OF STIPULATIONS.**—An action is properly dismissed for want of prosecution where no service of summons appears, and nothing has been done in the action for nearly thirteen years; but the judgment of dismissal is properly vacated upon motion of an assignee of the cause of action, upon showing that on the day after the commencement of the action the plaintiff and defendant had stipulated that judgment might be entered at any time, that the defendant had stipulated likewise with a former assignee of the cause of action two years thereafter, and also with the moving party as a subsequent assignee, ten years after the suit was brought, the last stipulation specifying a less rate of interest. (*Id.*)
5. **PROOF TO WARRANT JUDGMENT.**—Where the genuineness of the signatures to the stipulations was admitted merely for the purpose of the motion to vacate the judgment of dismissal, the court should require proof of such genuineness, and of the amount for which the plaintiff is entitled to judgment, before entering the judgment under the stipulations. (*Id.*)
6. **TRIAL—FAILURE OF PLAINTIFF TO APPEAR—COUNTERCLAIM—DISMISSAL—JUDGMENT UPON MERITS.**—Upon issue joined in an action to recover money, where the defendant has set up a counterclaim, plaintiff is not entitled to a dismissal of the action, under section 581 of the Code of Civil Procedure, without the consent of the defendant; and, upon failure of the plaintiff to appear at the trial, the defendant is not bound to take a dismissal of the ac-

PRACTICE (Continued).

tion, though he might do so, but he has the right, under section 581 of that Code, to proceed with the case, in the absence of the plaintiff, unless the court for good cause otherwise directs, and to have a judgment entered upon the merits finally disposing of the case; and it is not error for the court to grant such judgment. (*Clune v. Quitzow*, 213.)

7. **CONDEMNING LANDS FOR HIGHWAY—GENERAL AND SPECIAL FINDINGS—REFERENCE TO PLEADINGS—CERTAINTY.**—In an action to condemn lands for a public highway, a general finding "That all the facts alleged in the complaint are true, except as to those hereinafter specified," and special findings following, which are inconsistent with certain allegations of the complaint as to all of the property sought to be condemned, and which specifically set forth the ownership acreage, value, damages, and benefits to the tracts belonging to the defendants, about which any issue was presented, and which covered the entire lands in controversy, are not uncertain or obscure, and necessarily exclude the idea of any ownership in a fictitious defendant named in the complaint, with respect to which no issue was joined. (*Alameda County v. Crocker*, 101.)

8. **DEFENDANTS SUED BY FICTITIOUS NAMES—AMENDMENT TO COMPLAINT—JUDGMENT UPON APPEAL.**—Where defendants sued by fictitious names, were served, and appeared and answered by their true names, the complaint must be amended to insert their true names, but where such amendment was not made, and the specific rights in the land condemned of all persons sued by fictitious names were in fact determined, the absence of the amendment is not ground for ordering a new trial; but the judgment upon appeal will direct the lower court to amend the complaint as of date prior to the judgment, in order to support the judgment. (*Id.*)

9. **PREMATURE JUDGMENT AS TO ONE DEFENDANT—FINAL JUDGMENT—VACATION—PRESUMPTION UPON APPEAL.**—Where the court improperly entered a premature judgment condemning the interest of one defendant not appearing, before other defendants had appeared and answered, and properly included the interest of that defendant in the final judgment of condemnation of the interests of all defendants, it will be presumed, upon appeal of another defendant, that the court made an order vacating the premature judgment, and such judgment must be deemed harmless as to the appellant. (*Id.*)

See Appeal; Costs; Evidence; Findings; Insolvency; Instructions; Judgment; Jury and Jurors; New Trial; Place of Trial; Pleadings; Summons.

PROBATE LAW. See Estates of Deceased Persons.

PROMISSORY NOTE. See Negotiable Instruments; Payments.

PUBLIC LANDS.

1. CONTEST BETWEEN CLAIMANTS—JURISDICTION OF LAND DEPARTMENT.

—The land department has exclusive jurisdiction to determine all facts, and all inferences of fact, arising upon a contest between claimants of the public lands; and it is only where it is manifest that the land department decided the case upon an erroneous proposition of law, that its decision is reviewable by the courts. (*Wormouth v. Gardner*, 316.)

2. HOMESTEAD CLAIM—CLAIM UNDER ACT TO QUIET LAND TITLES—

CONCLUSIVE FINDINGS OF FACT.—Upon a contest in the land department of the United States between a homestead claimant and a claimant under the act of July 23, 1866, to quiet land titles in California, claiming by virtue of a deed from the heirs of a Mexican grantee of lands excluded from the grant by the survey and patent, where there is nothing in the proceedings of the land department to show that its decision was founded upon an erroneous view of the law, its findings of fact in favor of the homestead claimant, to whom the patent was issued, and against the other claimants, that the land in controversy was never included within the boundaries of the Mexican grant, and was never so regarded, and that the grantee of the heirs, at the time of the deed to him, knew, or had reason to believe, that it was not so included, and that he was not a *bona fide* purchaser thereof, within the meaning of that act, are conclusive, and cannot be reviewed by the court. (*Id.*)

3. PATENT UNDER MEXICAN GRANT—BOUNDARIES.—The United States patent to the heirs of a Mexican grantee is finally determinative of the boundaries of the grant. (*Id.*)

See Boundaries.

PUBLIC OFFICERS. See Office and Officers.

QUIETING TITLE.

ACTION TO QUIET TITLE—POSSESSION—IMMATERIAL FINDING.—Possession is not essential to the maintenance of an action by the owner of the land to quiet his title thereto; and a finding upon that question is immaterial, and it is immaterial whether it is supported by the evidence. (*Casey v. Leggett*, 664.)

See Boundaries, 1; Estates of Deceased Persons, 26; Guaranty, 3; Pleadings, 9; Survey, 1.

QUO WARRANTO. See Elections, 5.

RAILROADS. See Corporations, 1, 2.

RAPE. See Criminal Law, 30, 31.

RECEIVER. See Estates of Deceased Persons, 26.

REDEMPTION. See Injunction, 1, 4.

RESTRAINT ON ALIENATION. See Trust Deed, 1.

ROAD COMMISSIONERS. See Office and Officers, 4.

ROBBERY. See Office and Officers, 11-13.

SAN FRANCISCO. See Van Ness Ordinance.

SCHOOL LANDS. See State Lands.

SCHOOLS. See Municipal Corporations, 3, 4; Orphan Asylum.

SLANDER. See New Trial, 25, 26.

SPECIFIC PERFORMANCE. See Judgment, 2.

STATE LANDS.

1. SCHOOL LANDS OF STATE—CONCLUSIVENESS OF PATENT—CHARACTER OF LAND—COLLATERAL ATTACK BY MINING CLAIMANTS.—Where public land of the United States was surveyed and sectionized, and designated upon the survey as agricultural land, and was thereafter certified as such by the land department of the United States, and listed as such to the state for school purposes, under the grant of 1853, and was subsequently patented by the state as agricultural land, the investigation as to the character of the land is concluded, as against a collateral attack; and no persons subsequently intruding upon the patented land, for the purpose of mining, can assail the state patent by proof that the land was mineral at the time of the grant to the state, and was reserved as such from the grant. (*Saunders v. La Purisima Gold Mining Company*, 159.)
2. GRANT OF SCHOOL LANDS TO STATE—ABSENCE OF KNOWN MINERALS.—The grant by Congress to this state of the sixteenth and thirty-sixth sections, by the act of 1853, was a grant *in presenti*, and if at that time there were no known minerals, or other exceptions noted in the grant, those sections then became the land of the state. (*Id.*)
3. ADJUDICATION AS TO CHARACTER OF LANDS—CASE OVERRULED.—The decisions of the land department of the United States as to the nonmineral character of a school section, and as to the absence of any exceptions or limitations contained in the act of 1853, and the subsequent patent of the state therefor, are conclusive adjudications as to the character and condition of the land, as against all third parties subsequently entering upon the land. *Hermocilla v. Hubbell*, 89 Cal. 5, overruled, on this point. (*Id.*)

STATUTES.

STATUTORY CONSTRUCTION.—A statute relied upon as conferring rights to a governmental gratuity is to be strictly construed. (*City and County of San Francisco v. Sharp*, 534.)

See Municipal Corporations, 1, 2; Office and Officers, 1-7.

STATUTES OF LIMITATIONS. See Community Property, 1-3; Corporations, 13, 14, 18, 19; Estates of Deceased Persons, 15, 21, 22 Mechanic's Lien, 7; Payments, 1, 2; Pleadings, 2.

STIPULATIONS. See Practice, 1-5.

STOCK AND STOCKHOLDERS. See Corporations.

STREET ASSESSMENT.

1. **STREET ASSESSMENT—JUDGMENT OF FORECLOSURE—COLLATERAL ATTACK—ACTION TO QUIET TITLE.**—A judgment foreclosing the lien of an alleged street assessment upon certain lands rendered in an action in which the owners were made defendants, and were personally served, and appeared and contested the assessment, and failed to appeal from the judgment, is conclusive of the validity of the assessment, and cannot be collaterally attacked on account of invalidity of the assessment in a subsequent action by one claiming title under the sheriff's deed, to quiet his title against subsequent grantees of the defendants in the foreclosure suit. (*Wood v. Jordan*, 261.)
2. **STREET WORK IN SAN FRANCISCO—LANDS OF CITY—PRIVATE CONTRACT NOT AUTHORIZED.**—The city of San Francisco has no power either under the consolidation act and amendments thereto, or under the Vrooman act, to make a private contract, without competitive bidding, for street work in front of the lands owned by it, the cost of which is chargeable against and payable out of the funds of the city. (*City Improvement Company v. Broderick*, 139.)

STREETS, ROADS AND HIGHWAYS. See Dedication, 6-10; Estates of Deceased Persons, 36, 39; Survey.

SUBROGATION.

1. **RELEASE OF PRIOR MORTGAGE OF WIFE'S PROPERTY—UNAUTHORIZED SECOND MORTGAGE—VOLUNTARY PAYMENT—MISTAKE OF LAW—SUBROGATION.**—A stranger to a prior mortgage of the wife's property who voluntarily advanced money upon an unauthorized second mortgage thereupon executed by the husband assuming to act under a power of attorney from the wife, which did not authorize the loan or the mortgage, and who voluntarily caused part of the money advanced to be paid to release and discharge the prior mortgage, for his own supposed security, acting under a mistake of law, with knowledge of all the facts, cannot, upon the declaring of the second mortgage invalid, be subrogated to the rights of the prior mortgagee as to the money so voluntarily paid. (*Brown v. Rouse*, 645.)
2. **SUBROGATION NOT ALLOWED IN FAVOR OF VOLUNTEER.**—Subrogation will not be decreed in favor of a mere volunteer who, without any duty, pays the debt of another. It will not arise in favor of a stranger; but only in favor of a party who on some sort of compulsion discharges a demand against a common debtor. (*Id.*)

See Negligence, 15; Trust Deed, 23.

SUMMONS.

1. FORECLOSURE OF MORTGAGE—SERVICE OF SUMMONS—FALSE RETURN—VACATION OF JUDGMENT—IMPROPER CONDITION AS TO COSTS.—

The defendant in an action to foreclose a mortgage, who was not served with summons, and against whom a false return of service thereof was made, has an absolute right, upon application within six months after entry of the judgment of foreclosure, and upon proof of the facts, to have the judgment vacated for want of jurisdiction, and the service of the summons quashed. The court has no power to impose costs as a condition to the vacation of the judgment; as the application is not made under section 473 of the Code of Civil Procedure, but is for the setting aside of a judgment which is void for want of jurisdiction. (*Waller v. Weston*, 201.)
want of jurisdiction. (*Waller v. Wetson*, 201.)

2. KNOWLEDGE OF SUIT IMMATERIAL.—Actual knowledge by the defendant of the suit against him is immaterial, and cannot be the equivalent of legal service of the summons upon him, or require him to appear in the action, or warrant the court in entering judgment against him for failure to appear. (*Id.*)

SURETIES. See Estates of Deceased Persons, 10, 11.

SURVEY.

1. ACTION TO QUIET TITLE—BOUNDARY OF STREET—CROSS-COMPLAINT OF CITY—UNCERTAINTY.—In an action against a city to quiet title to a lot of land involving the boundary of a street, a cross-complaint by the city against the plaintiff and other defendants brought in as parties to quiet the title of the city to the street, which is alleged to have been encroached upon by their improvements, but which does not locate the boundaries of the street, nor show to what extent their improvements have encroached upon it, is demurrable for uncertainty in those particulars. (*Hellman v. City of Los Angeles*, 383.)2. EVIDENCE—LOCATION OF BOUNDARY—LOSS OF MONUMENTS—CONFORMITY OF STREET IMPROVEMENTS TO LOT IMPROVEMENTS.—Where it appeared in evidence that all of the monuments of the official survey of a street were lost, and the question of fact upon which the rights of appellants depended related to the location of the south boundary of the street, evidence that all of the improvements on such boundary conformed to the line of appellant's improvements on a corner lot derived by deed from the city, and which had occupied that line for twenty-five years, and that during that period the sidewalk and street improvements were all made to conform to that line, is competent evidence to show the location of such boundary. (*Id.*)

3. INCOMPETENT EVIDENCE OF ENGINEERS—INACCURATE SURVEY.—Where it appears that the official survey of the street in controversy was inaccurate, and there was no proof as to the lines originally established by it, other than the line of improvements of the lots and

SURVEY (Continued).

sidewalks thereupon, the evidence and maps of engineers not based upon the official survey, but upon the assumed correctness of the line of improvements of another street, and upon the supposition of a uniform width of the street, and involving the alteration of the length of lots shown by the official map, and constituting mere guess-work as to the location of the lines of the official survey of the street in question, is incompetent and inadmissible. (Id.)

4. **INACCURACY OF EARLY SURVEYS—COMMON KNOWLEDGE—JUDICIAL NOTICE.**—The inaccuracy of the early surveys in this and other states is a matter of common knowledge of which the courts may take judicial notice. (Id.)

TAXATION. See Counties; Municipal Corporations, 9-13.

TAX COLLECTOR. See Office and Officers, 8-10.

TENANTS IN COMMON. See Adverse Possession; Estates of Deceased Persons, 21; Homestead, 2.

TENDER.

1. **TENDER PENDING APPEAL FROM JUDGMENT—STOPPAGE OF INTEREST.**—A tender by the defendant, to the plaintiff, pending an appeal by the plaintiff from a judgment in his favor, of the full amount of the judgment, with all costs, and interest to the date of the tender, if refused, stops interest from the date of the tender. (Ferrea v. Tubbs, 687.)
2. **TENDER TO CLIENT PENDING SUIT—AUTHORITY OF ATTORNEY.**—A tender pending suit is properly made to the opposite party personally, and need not be made to his attorney, whose authority to control the suit does not preclude such tender. It primarily rests with the client, and not with his attorney, to decide whether or not the amount tendered shall be accepted in full satisfaction of his claim for money due. (Id.)
3. **REFUSAL OF TENDER—RELEASE OF INTEREST.**—The refusal by a plaintiff pending his appeal from a judgment of a valid tender made to him by the defendant, operates as a release by the plaintiff as judgment creditor of all interest which would otherwise have accrued thereon after the date of the tender. (Id.)
4. **CONDITIONAL TENDER—DEMAND FOR RECEIPT.**—In this state, under section 1499 of the Civil Code, a debtor has a right to demand a written receipt from his creditor of any property delivered in performance of his obligation; and a valid tender of a sufficient amount may be properly conditioned upon a written receipt for the money tendered as payment in full of a judgment with interest and costs. (Id.)
5. **DEPOSIT OF MONEY TENDERED.**—The money tendered need not be deposited in court, when it is not sought to extinguish the obligation, but merely to stop the running of interest. (Id.)

TENDER (Continued).

6. **INTEREST UPON JUDGMENT—STAY OF EXECUTION.**—The stay of execution upon a judgment for the plaintiff pending an appeal therefrom by the plaintiff does not operate to suspend the running of interest, or preclude a tender by the defendant for the purpose of stopping interest thereon. (Id.)
7. **APPLICATION TO SUPREME COURT—JURISDICTION.**—The respondent was not bound to make any application to the supreme court pending the appeal by the plaintiff for leave to make the tender. The supreme court took the case as made up in the trial court, and had no jurisdiction to examine into the merits of the tender. (Id.)
8. **REMITTITUR—PAYMENT OF MONEY TENDERED—DUTY OF SUPERIOR COURT.**—Upon the going down of the *remittitur*, the defendant had the right to bring the money tendered into court, and it then became the duty of the superior court to inquire into the effect of the tender, and to determine the amount required to satisfy the judgment. (Id.)

See Vendor and Vendee, 5.

THRESHER'S LIEN. See Mechanic's Lien, 7.

TREASURER. See Office and Officers, 10-13.

TRUST DEED.

1. **VALIDITY OF TRUST DEED—RESTRAINT UPON ALIENATION.**—A trust deed to secure indebtedness payable at a fixed future date does not create a trust in violation of the statute against perpetuities, or forbidding restraint upon alienation beyond the possibility of lives in being. (*Staacke v. Bell*, 309.)
2. **PAYMENT BY PURCHASER—RELEASE—UNKNOWN JUDGMENT LIEN—PRIOR SECURITY—SUBROGATION.**—A purchaser from the grantor of a trust deed, who has paid off the note secured thereby, and received a release, without actual knowledge of the existence of a subsequent judgment lien upon the premises, is entitled in equity to be treated as the assignee of the note secured by the trust deed, and to be subrogated to the prior security, and to have it revived and enforced as against the holder of the junior lien of the judgment, whose rights cannot be prejudiced thereby, but will be in the same condition as if the trust deed were originally enforced. (*Darrough v. Herbert Kraft Company Bank*, 272.)
3. **CONSTRUCTIVE NOTICE—DOCKETING OF JUDGMENT.**—The constructive notice inferred from the docketing of the judgment does not estop the purchaser, or affect his right to be subrogated to the prior security which was paid off in actual ignorance of the existence of the junior lien of the judgment. (Id.)

TRUST. See Community Property, 1, 4; Gift, 1; Guardian and Ward, 1; Pleadings, 3, 4.

VAN NESS ORDINANCE.

1. **SAN FRANCISCO "HOSPITAL LOT"—DEDICATION TO PUBLIC USE—ORIGINAL POSSESSOR NOT ENTITLED TO COMPENSATION.**—One claiming under an original possessor of pueblo land which was more than one-twentieth part of the lot designated on the Van Ness map as a "hospital lot," and which was dedicated to public use under the ordinances ratified by the act of March 11, 1858, and the confirmatory act of Congress of July 1, 1864, has no title or estate in the lot which could be asserted against the United States, the state or the city, and is not entitled under section 6 of the Van Ness ordinance to any compensation as a condition precedent to the quieting of the title of the city to such "hospital lot." (*San Francisco v. Sharp*, 534.)
2. **TERMS OF ORDINANCE NO. 822 SUPERSEDED BY RATIFICATION OF VAN NESS MAP.**—The terms of section 6 of the Van Ness ordinance were superseded so far as inconsistent with the Van Ness map showing the reservation of lots, blocks, and squares for public use, and with the order adopting said map, and the legislative ratification thereof, which operated immediately to dedicate the lots to public use. (*Id.*)

VENDOR AND VENDEE.

1. **VENDOR AND PURCHASER—CONTRACT OF SALE—INTEREST IN PROFITS OF RESALE—PURCHASE OF VENDEE'S INTEREST—CONSIDERATION.**—Under a purchase by the vendor and a third person of the interest of the vendee in a contract for the sale of land, upon which five thousand dollars had been paid by the vendee and which provided for an interest in the profits of the resale of the land by the vendor, out of which the remainder of the purchase money was to be paid, for which interest of the vendee, the purchasers paid five thousand dollars, subject to reimbursement out of the profits of the original five thousand dollars paid by the vendee, and agreement by the purchasers that whatever part of such original payment should not be repaid to the vendee out of the profits by a fixed date, should be paid by the purchasers to him, constitutes part of the consideration for the purchase of the contract, and is not an agreement for a penalty or liquidated damages. (*French v. McCarthy*, 508.)
2. **ACTION UPON CONTRACT—AMENDMENT OF COMPLAINT.**—In an action upon the contract to make good the unpaid portion of the original five thousand dollars of purchase money paid by the vendor, where the terms of the contract are set forth in the complaint, and issue has been joined by answer, the court may permit an amendment of the complaint to correct an inconsistency between the prayer of the complaint and the facts stated therein. (*Id.*)
3. **FAILURE TO MAKE AMENDMENT ALLOWED—CORRECTION OF RECORD.**—The failure to make the amendment allowed formally upon the record, does not necessitate a reversal of the judgment, but the record will be ordered to be corrected to conform with the order permitting the amendment. (*Id.*)

VENDOR AND VENDEE (Continued).

4. **AGREEMENT TO SUBSTITUTE STOCK FOR LAND—PAYMENT—PLEDGE—FINDING AS TO VALUE IMMATERIAL.**—Where there was a supplemental agreement that the land should be conveyed to a corporation, and that the stock should take the place of the land, under an allegation in the answer that plaintiff had accepted stock in payment of his obligations under the agreement and under the claim of plaintiff that the stock was received by way of pledge or collateral security for the contract sued upon, there is no issue authorizing a finding as to the value of the stock. (Id.)
5. **TENDER OF PLEDGED STOCK—RETENTION UNTIL SATISFACTION OF JUDGMENT.**—In an action upon a contract to pay a sum of money, stock held by way of pledge or collateral security for the obligation, need not be tendered by the plaintiff, but may be retained by him until satisfaction of the judgment in his favor; and it is not necessary that the judgment shall provide that the stock shall be surrendered, upon such satisfaction. (Id.)
6. **CONTRACT OF SALE—TITLE UNDER FORECLOSURE—PAYMENT BY MORTGAGOR—CONDITIONAL PROVISIONS—CONSTRUCTION.**—A contract providing that a mortgage, upon payment of two thousand dollars by one of two mortgagors, would bid in the mortgaged premises under foreclosure, for the full amount of the mortgage debt of four thousand dollars, interest, costs and expenses, and if there was no redemption, would, upon payment within six months of the residue of the bid, with interest, after deducting the payment made, assign the certificate of sale to such mortgagor, or would, within thirty days after obtaining a deed, convey the property to him, upon payment of the full amount of the original bid, with interest, taxes, et cetera, crediting thereon a first mortgage to be executed for four thousand dollars, upon terms and conditions specified, time being of the essence of the contract, and that, in case of redemption by a third party, the contract should end, and the two thousand dollars should be repaid—is not to be construed as an ordinary, simple contract for the sale of land, with a payment of two thousand dollars made thereon, as part of the purchase price. (Swain v. Jacks, 215.)
7. **CONSIDERATION FOR PAYMENT—CONDITION OF RECOVERY BACK.**—The relieving of the mortgagor, under such contract, from any deficiency judgment, was a consideration for the payment of the two thousand dollars; and if the contract is not rescinded, the money paid cannot be recovered back upon any other condition than that of the redemption by a third party specified in the contract. (Id.)
8. **OFFER OF PERFORMANCE BY PURCHASER—ABSENCE OF VENDOR FROM STATE—EXCUSE.**—Under a contract of sale, where there was no tender or offer of performance by the purchaser at any time, the fact that the vendor was absent from the state, when performance by the purchaser was required, cannot excuse or render impossible

VENDOR AND VENDEE (Continued).

an offer of performance, which might be made, in such case, under the terms of section 1489 of the Civil Code. (Id.)

9. **EFFORTS OF PURCHASER TO CORRESPOND—RESCISSION—RECOVERY OF PAYMENT.**—Mere ineffectual efforts of the purchaser, by correspondence and inquiry, to communicate with the absent vendor, and to seek performance of the contract from the vendor, does not render the failure of the vendor to comply with the contract within the time limited, an election to rescind the agreement on his part, or authorize the recovery back of the money paid under the terms of the contract by the purchaser. (Id.)
10. **USE AND OCCUPATION—SALE UNDER FORECLOSURE—RESCINDED CONTRACT.**—An agreement between a mortgagee and the son of a mortgagor who was living on the mortgaged premises with his father, that the mortgagor would obtain title under foreclosure, and convey it to the son, on certain terms specified, which was mutually rescinded after the son had made a small payment thereon, does not relieve him from liability to the mortgagor for use and occupation after such rescission, and after purchase by the mortgagor at the sale under the foreclosure; and a judgment for the value thereof, less the payment made under the agreement, will be affirmed. (Lynch v. Pearson, 21.)
11. **CONTRACT OF SALE—POSSESSION NOT TAKEN UNDER VENDOR—EXCEPTION TO RULE.**—The rule that one who enters by virtue of a contract of sale of the premises is not thereafter liable to an action for use and occupation, has no application where possession was not taken under the contract, and the vendor had no power to put the purchaser in possession, but the contract of sale was made by a mortgagee to sell the title to be acquired under foreclosure to a party already in possession, and was rescinded before such title was acquired. (Id.)

VENDOR'S LIEN.

1. **VENDOR'S LIEN—CODE PROVISIONS—EQUITY RULE.**—The provisions of sections 3046, 3047, and 3048, of the Civil Code, are intended to make more clear and definite the equity rule as to vendor's liens, by which a vendor who has made a deed of grant to the purchaser has an equitable lien upon the granted premises for the amount of the unpaid purchase money, if it is unsecured otherwise than by the personal obligation of the buyer. (Selna v. Selna, 357.)
2. **FOUNDATION AND ORIGIN OF DOCTRINE.**—The foundation of the doctrine as to the lien of a vendor is in the general principles of equity and moral justice, that a person who has acquired the estate of another, ought not in conscience, as between them, to be allowed to keep it and not pay the full consideration money; and the origin of the doctrine appears to be the principles of the Roman law, im-

VENDOR'S LIEN (Continued).

ported into the equity jurisprudence of England. (Id.)

3. **RIGHTS AND LIABILITIES OF PERSONAL REPRESENTATIVES.**—The lien of a vendor is not extinguished by his death, nor by the death of the grantee. It passes to the personal representatives of the deceased vendor, and may be enforced against the estate of the deceased grantee, or those into whose hands it may come. (Id.)
4. **WAIVER OF LIEN—INTENTION—INEQUITY.**—In order to constitute a waiver of the lien of the vendor, his intention must be evinced, expressly or impliedly, to dispense with the lien; or he must so place his rights in relation to the land sold as to make it inequitable to sustain the right thereto. (Id.)
5. **BURDEN OF PROOF AS TO WAIVER—PRESUMPTION.**—The burden of proof is upon the purchaser to establish that in the particular case the lien has been intentionally displaced or waived; and if, under all the circumstances, it remains in doubt whether the lien has been waived, it will not be presumed to have been waived, but will be sustained and enforced. (Id.)
6. **PRESENTATION OF CLAIM AGAINST ESTATE—OMISSION TO STATE CLAIM OF LIEN.**—There is no statutory provision requiring that a claim presented by the vendor against the estate of the deceased grantee for the amount of the unpaid purchase money, shall state that the vendor claims a lien against the granted premises for the amount of such claim; and though it is better that such statement should be made, yet the omission to make it does not constitute a waiver of the lien, or make it inequitable to enforce it. (Id.)
7. **ALLOWANCE OF CLAIM—QUALIFIED JUDGMENT—LIEN NOT CREATED.**—The allowance of a claim against the estate of a deceased person is only a qualified judgment, and does not create any lien upon the real or personal estate of the decedent, which can waive a vendor's lien. It only maintains the same general rights which the vendor had before the death of his grantee, to look not only to the land of the grantee, but to the property owned by him, to determine the collectibility of the note. (Id.)
8. **EFFECT OF JUDGMENT AT LAW.**—It seems that the recovery of a judgment at law for the unpaid purchase money, so far as not enforced by execution, does not preclude the vendor from enforcing his equitable lien against the granted land, for the unpaid portion of the purchase money. (Id.)

VENUE. See Place of Trial.

WAREHOUSEMAN.

1. **WAREHOUSE—SALE OF STORED GOODS FOR CHARGES—ACTUAL NOTICE TO OWNER ESSENTIAL.**—Under the statutes of this state, a sale

WAREHOUSEMAN (Continued).

of goods stored in a warehouse, to satisfy the lien of the warehouseman for unpaid storage charges, if the goods are other than perishable property, baggage or luggage, can only be made at auction after such actual notice to the owner of the time and place of sale, and notice to the public usual at the place of sale, as is required in the case of the sale of pledged property, or upon foreclosure of the right of redemption by a judicial sale under the direction of a competent court. (*Stewart v. Naud*, 596.)

2. **SALE OF HOUSEHOLD GOODS—CONVERSION.**—Upon the sale of stored household goods by a warehouseman to pay storage charges thereon, without actual notice to the owner, the warehouseman is liable to the owner for conversion of the goods. (*Id.*)
3. **NEGLIGENCE OF WAREHOUSEMAN—IGNORANCE OF OWNER'S ADDRESS.**—The negligence of the agent in charge of the warehouse in not having noted the address of the owner of the goods on the warehouse books, as requested, was the negligence of the warehouseman; and the resulting ignorance of his address cannot excuse the want of actual notice to him of the time and place of sale. (*Id.*)

WATER AND WATER RIGHTS.

1. **WATER RIGHTS—DIVISION OF STREAM—FUTURE DEVELOPMENT OF WATER—AMBIGUOUS CONTRACT—PRACTICAL CONSTRUCTION.**—Where the owner of land in which a stream arose contracted with an adjoining owner for a division of the stream so as to give to the latter, or his assigns, the right to the flow of the stream two days in each week through a certain ditch, or any other aqueduct conducted by the former, or his assigns, across the land of the latter, for which a right of way was given under the contract, to the former or his assigns, together with the right to the flow of the remainder of the stream, the possibility of the future development of additional water by the former, or his assigns, was a circumstance surrounding the parties, and the contract being ambiguous or doubtful in relation to water thus developed, the practical construction placed upon the contract by the parties in relation thereto must control. (*Mayberry v. Alhambra Addition Water Company*, 444.)
2. **USE OF DEVELOPED WATER UNDER TERMS OF CONTRACT—COMMINGLING—ESTOPPEL.**—Where the owner of the land upon which the stream arose conducted the natural water and that artificially developed, commingled together, in an aqueduct constructed across the lands of the adjoining owner, thereby bringing the whole flow within the literal terms of the contract, he cannot claim that the flow of the developed water across such lands was without right and not under the contract. (*Id.*)
3. **ACQUIESCENCE OF PARTIES—RIGHT TO USE OF FLOW.**—Both parties having acquiesced in the right to flow the developed water across

WATER AND WATER RIGHTS (Continued).

the adjoining lands under the contract, the adjoining owner or his grantee has the right to use it two days each week, as part of the flow of the stream, so long as it is so conducted, in so far as may be reasonably necessary for the irrigation of the original adjoining tract. (Id.)

4. **WANTON DIVERSION NOT ALLOWED.**—The adjoining owner cannot make a wanton diversion of the water, to the injury of the other party, without benefit to himself. (Id.)
5. **RIGHT TO PERIODIC FLOW OF STREAM—MEASUREMENT.**—Where a party has a contract right to the periodic flow of the water of a stream for two days in the week, he is entitled to the entire flow of the stream for the time specified when necessary for the irrigation of his tract; and his rights in the stream cannot properly be measured by a fixed quantity thereof in inches. If he does not at present need or use all the flow of the stream, that fact does not authorize a restriction of his privileges under the contract. (Id.)
6. **ACQUIESCENCE IN MEASUREMENT.**—The temporary acquiescence of such party in a measurement of his water right by inches by the other party to the contract, whatever effect it may have upon his claim for damages, cannot affect his rights under the contract, if not continued for a sufficient time to bar his rights by adverse user. (Id.)
7. **WATER RIGHTS—CLAIM OF SURPLUS WATERS—INTERFERENCE WITH NATURAL FLOW OF STREAM—INJUNCTION.**—Where it appears that the respondent as plaintiffs and the nonappealing defendants were entitled to all the waters of a creek and its tributary, which naturally flow within the banks of the creek, the appellants, claiming an overflow of surplus waters, cannot tap the creek at a point above which there is no overflow of surplus waters, so as to take the water of lakes forming a source of supply to the creek, and to interfere with the quantity of water usually flowing in the natural channel of the creek; and they were properly enjoined from so doing by the judgment appealed from. (Baxter v. Gilbert, 580.)

WAY.

1. **WAY OF NECESSITY—TITLE UNDER FORECLOSURE OF MORTGAGE—WAY OVER HOMESTEAD OF MORTGAGOR.**—A way of necessity arises when one grants a parcel of land surrounded by his other lands, or where the grantee has no access to it from the public road except over the land of the grantor, or that of a stranger; and this rule applies to a grantee who takes title under foreclosure of a mortgage to land so situated that there is no access thereto excepting across a homestead of the mortgagor, which was included in the mortgage, but was not sold thereunder. (San Joaquin Valley Bank v. Dodge, 77.)

WAY (Continued).

2. SUFFICIENCY OF COMPLAINT—DESCRIPTION OF WAY—STIPULATION—
APPEAL.—A complaint to establish a way of necessity, which sets forth the facts as to the ownership by the different parties, and shows the right to a way of necessity, is not fatally defective for not describing the way, the location of which the defendant had the right to dictate; and where the case was tried on the theory that the complaint was sufficient, and the parties stipulated as to the proper description of the way, if it should be adjudged that one exists, the complaint will be held sufficient upon appeal. (Id.)

See Dedication, 11-15.

WILLS. See Estates of Deceased Persons; Orphan Asylum.

WRIT OF RESTITUTION. See Ejectment.

